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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-3

MARGARET HOUSEN,

Petitioner,

v.

"PONY" DUKE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

Petitioner Margaret Housen respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wyoming. By that judgment the Wyoming Supreme Court reversed a verdict that had been entered in favor of Petitioner in the amount of $1,300,000 on the grounds that the statute of limitations barred the action. This case was a tort action in which it was determined by a jury that the respondent, with gross negligence, had caused infection to the petitioner, which resulted in lifetime pain and high probability of sterility.

The decision of the Supreme Court of Wyoming arbitrarily and capriciously vacated the judgment that had been entered in favor of Petitioner by engag-

ing in appellate fact finding that was not only unsupported by evidence introduced at the trial, but was in some instances directly *contradicted* by the evidence. Additionally, the decision unconstitutionally applied the Wyoming borrowing statute by arbitrarily choosing one of a number of jurisdictions, which was detrimental to the petitioner rather than the respondent who had caused uncertainty to exist as to which of the jurisdictions was appropriate.

OPINIONS BELOW

The decision of the Supreme Court of the State of Wyoming is reported as *Duke* v. *Housen*, 589 P. 2d 334 (Wyo. 1979), and the order denying rehearing is reported as *Duke* v. *Housen*, 590 P.2d 1340 (Wyo. 1979). The original opinion is appended to this Petition at Page 1a; the order denying rehearing is appended to this Petition at page 49a. Neither decision was agreed upon by a unanimous court.

JURISDICTION

The judgment of the Wyoming Supreme Court was entered on January 12, 1979. A timely petition for rehearing was denied by an order entered March 2, 1979. An Order Extending Time to File Petition for Writ of Certiorari was entered June 4, 1979, wherein the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, granted Petitioner a continuance of time within which to file her petition for writ of certiorari to and including July 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. May the Supreme Court of the State of Wyoming constitutionally vacate a judgment entered on behalf of Petitioner when that decision was reached under the following circumstances:

   a. The Wyoming Supreme Court arbitrarily engaged in fact finding *at the appellate level* and did so by making factual determinations that were without support and in some instances flatly contradicted by the record;

   b. The Wyoming Supreme Court arbitrarily relieved Respondent Duke's burden of proving his affirmative defenses, most particularly his defense of the statute of limitations.

   c. The Wyoming Supreme Court arbitrarily denied Petitioner the benefit of the standing principle of appellate procedure which grants to the prevailing party at trial every favorable inference to be drawn from the evidence.

2. In arbitrarily denying Margaret Housen the appellate safeguards applied to every *other* litigant by the Wyoming Supreme Court, and by vacating a judgment that had been properly returned by a jury in Park County, Wyoming, did the Supreme Court of Wyoming violate Petitioner's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable constitutional provision is the Fourteenth Amendment to the United States Constitu-

tion.[1] The Wyoming statute of limitations was Section 1-18, W.S. 1957, presently cited as Section 1-3-105, W.S., 1977.[2] The Nebraska statute of limitations was Section 25-207, N.R.S.[3] The Wyoming "borrowing

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[1] Amendment 14, United States Constitution

AMENDMENT XIV

Section 1.

(Citizenship Rights Not To Be Abridged By States)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[2] Section 1-18, W.S. 1957, presently cited as Section 1-3-105, W.S. 1977:

Within four years, an action for trespass upon real property; an action for the recovery of personal property, or for taking, detaining or injuring the same; but in an action for the wrongful taking of personal property the cause of action shall not be deemed to have accrued until the wrong-doer is discovered; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; and action for relief on the ground of fraud; but the case of action in such case shall not be deemed to have accrued until the discovery of the fraud.

[3] Section 25-207, NRS

Actions for trespass, conversion, other torts; frauds; exceptions.

The following actions can only be brought within four years:

(1) An action for trespass upon real property;

(2) An action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property;

(3) An action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; and

statute" was Section 1-25, W.S., 1957, presently cited as Section 1-3-117, W.S. 1977.[4]

STATEMENT OF THE CASE

On April 19, 1974, Margaret W. Housen filed a tort action against Angier St. George Biddle "Pony" Duke, in the Fifth Judicial District Court in and for Park County, Wyoming. The case concerned the fact that Mr. Duke had negligently, willfully, and wantonly infected Miss Housen with an infectious venereal disease, namely gonorrhea; and, as a consequence caused to her person irreparable damage to internal organs. Adhesions were formed in the lower abdomen which, despite surgery performed in July, 1973, would cause pain which would continue for the remainder of Miss Housen's life and may cause her to become a "pelvic cripple". In addition to the adhesions which formed in the lower abdomen, a fallopian tube was completely blocked thus impairing, and most probably inhibiting permanently, her ability to bear children.

Miss Housen lived in a northern Virginia suburb of Washington, D.C. Mr. Duke had himself introduced to her on Saturday, April 4, 1970, through Miss Housen's brother. He met her in her family home and later entertained her family at a restaurant.

---

(4) An action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, except as provided in Sections 30-2206 and 76-288 to 76-298.

[4] Section 1-25, W.S. 1957, presently cited as Section 1-3-117, W.S. 1977:

If, by the laws of the state or county where the cause of action arose the action is barred, it is also barred in this state.

What followed after that was a touching, and ultimately, tragic relationship that crisscrossed the breadth of the nation. Mr. Duke called Miss Housen at least ten times on Sunday, saying that he had fallen in love, and wanted her to marry him and travel to Wyoming to one of his family's residences. For three days he insisted and finally she agreed to travel with him to Wyoming. On April 8, 1970, she flew to meet him at LaGuardia Airport; he wanted to visit his grandmother, so the trip was postponed for a day. They had intercourse in New York. They spent the nights along the way in several states and they were, of course, intimate.[5] When she noticed that he took some pills one morning, he said it was for a sore throat, and never during the entire experience did Mr. Duke, directly or indirectly, advise her or intimate to her that he had a venereal disease.

On Sunday, April 12, 1970, they arrived in Denver, Colorado. He drove to the Brown Palace Hotel, told her to be sure to stay in the old part, gave her fifty dollars, and he left her in Denver, stranded. Utterly alone, she called her brother. He flew out West, and the two of them met with Mr. Duke at his family's ranch at Meeteetsee, Wyoming. He apologized, they reconciled, and he agreed to travel back to Washington, D.C. to apologize to her family. The marriage

[5] As the Opinion set forth, Appendix 16a, "sexual intercourse between the plaintiff and defendant took place on the dates and in other state jurisdictions in accordance with an itinerary as follows: April 4-5, 1970—State of Virginia; April 7-8, 1970—Tuxedo, New York; April 8-9, 1970—Erie, Pennsylvania; April 9-10, 1970—State of Iowa; April 10-11, 1970—Ogallala, Nebraska; April 20-21, 1970, New York City, New York."

plans were reaffirmed. On Monday, April 20, 1970, they arrived in Washington D.C. To this time, she experienced no visible signs of the disease, and was unaware that she had contracted it.

After meeting with Margaret Housen's family, Pony Duke asked Margaret to return with him to New York City and she was reaffirmed in her belief that they would be married. They arrived in New York on the evening of April 20, 1970, checked into a hotel, and spent the night. On the morning of April 21, 1970, the following happened:

> He got up and said he had some business to take care of . . . I said, where are you going? He said, I am going to the doctor. I said why? He said, I have gonorrhea and you have it too, and you better go to the doctor as well. He picked up the jacket to his suit and laughed and walked out the door.
>
> —Testimony of Margaret Housen during trial, R.716.

The evidence developed at the trial was that Mr. Duke had known prior to April 1, 1970, that he had gonorrhea.

In disbelief and shock, she gathered herself together, flew to Washington, and was examined by a doctor on April 22, 1970. The medical tests were positive and she underwent treatment and on May 14, 1970, another examination produced a negative result and she believed she had no further consequences of the gonorrhea infection.

In January, 1973, Miss Housen became aware of a persistent pain in the abdominal lower right quadrant. The increase in pain caused her to seek medical atten-

tion in March, 1973. An exploratory laparotomy was performed on July 9, 1973, and revealed that the right fallopian tube was bound to the cecum and the colon by adhesions which were caused by the previous infection of gonorrhea.

In January, 1974, the pain had returned and Miss Housen spoke with her physician who informed her that there was nothing more that could be done as another operation would most probably be iatrogenic. An operation to lyse the adhesions and relieve the pain would only result in more adhesions forming and subsequently more and more pain.

On April 19, 1974, suit was filed against Pony Duke in the State of Wyoming, his residence at that time.

Exhaustive medical testimony was presented at the trial. Mr. Duke, however, failed to produce his complete medical records despite a court order demanding such records. At the end of a two-week trial the case was given to a jury which responded in less than six hours with a verdict of $300,000 in exemplary damages and $1,000,000 in punitive damages.

The jury, prior to awarding damages had responded to two special interrogatories submitted to it by the Court. The answers were as follows:

Interrogatory No. 1: Do you find that the Defendant was infected with gonorrhea during the period of April 4, 1970 through April 21, 1970?

/s/ Yes

Interrogatory No. 2: Do you find that the Plaintiff was advised on April 18, 1970, that the Defendant had or had had gonorrhea?

/s/ No

—See footnote 1, *Duke* v. *Housen*, 589 P.2d 334, 339 (Wyo. 1979).

The significance of the two interrogatories is twofold:

1. The jury was unable to determine the date of infection with precision other than the period of time of April 4, 1970 through April 21, 1970;
2. The jury determined that Miss Housen had no knowledge of the condition of Mr. Duke's state of health as of April 18, 1970.

Mr. Duke's defense during the trial had been that he had been cured by the time he met Miss Housen. Further, he argued that the action was barred by the Wyoming four-year statute of limitations, since he claimed to have informed her on April 18, 1970 that he had an infectious venereal disease. The jury in its answers to the two interrogatories explicitly contradicted and rejected Mr. Duke's claim.

On appeal to the Wyomingg Supreme Court, Mr. Duke raised the issue of the statute of limitations, together with other issues that were not discussed or determined by the Supreme Court. The defense had been raised at the trial level, and District Court Judge Dixon had rejected the argument. On the appellate level, Mr. Duke shifted his argument from the Wyoming statute, and claimed that the three-year statute of limitations in New York was applicable. He cited the Wyoming borrowing statute, and argued that it made the New York statute applicable.

In reply, Miss Housen's brief discussed the following principles:

1. The law of the forum is the applicable law for purposes of applying the statute of limitations. This well-recognized rule of law has been established in Wyoming for more than seven decades.

2. The borrowing statute, because it is in derogation of the common law, must be strictly construed.

3. The borrowing statute places a burden on the person asserting it to prove that the cause of action arose in a *particular* jurisdiction *other* than Wyoming.

4. Mr. Duke did absolutely nothing during the litigation to prove that the cause of action arose in another state. Thus, he failed in his burden to prove the application of the Wyoming borrowing statute.

5. Mr. Duke's selection of the New York statute, in face of the multi-state nature of the relationship, was completely arbitrary, self-serving, and unproved.

The principles raised by Miss Housen were of particular importance due to the unique circumstances of this tort. The issues of *where* the cause of action occurred, and *when* the cause of action arose were considerably different than in a normal tort action. In what states did intercourse take place? Of those states, in which ones was the germ implanted in her body that led to the infection? Of the states that they traveled through, where did the infection begin? And *when* did the cause of action really arise? Did it arise first when scars commenced to form and the keloid tissue first began to develop, or did the cause of action

not arise until the condition developed to the point that she experienced pain in 1973 and learned that the asymptomatic infection of April 1970 had not in fact been arrested? Did the petitioner's cause arise when she was informed that she was permanently and irrevocably damaged as a consequence of Mr. Duke's blatant disregard for her health and safety?

Respondent Duke offered no factual proof on any of these issues. He chose an alternate tactic at the trial, attempting to prove that he had been cured of gonorrhea. Once having embarked on a trial tactic, it is both improper and disingenuous for him now to try a new and different tactic on appeal. The suit was brought for injuries arising out of the scar formation, which included surgery, infertility, and pain and suffering emanating from the scar tissue injury. It is an ongoing process of such a kind that one could not, from the record, tell when exactly, the infection took hold, when the scars actually commenced to form, and when and where the metamorphosis had ultimately advanced to the point where an operation was necessary, but the diagnosis was made that no further treatment would reverse the permanent damage.

With this background and without adducing any evidence to support his assertion, Duke argued to the Wyoming Supreme Court that the New York statute was made applicable through the Wyoming borrowing statute. But what of the *other* states that they traveled through? Why didn't Mr. Duke select the Wyoming four-year statute (§1-18, W.S. 1957), or the Colorado six-year statute (§13-80-119,CRS), or the Nebraska four-year statute (§25-207, NRS), or the Ohio four-year statute (§2305.09, ORCA), or the Illinois five-year statute (§83-16, IRS), or the Montana four-

year statute (§93-2613, MRC)?

It is clear that even under the most conservative reading of any statute of limitations, that the action was properly filed in Wyoming within the Wyoming four-year statute of limitations. Her first knowledge that she *might* have gonorrhea was on April 21 1970; her first knowledge that she *had* gonorrhea was on April 22, 1970; her first knowledge that she was permanently damaged by gonorrhea was in July of 1973. Duke sought application of a four-year or less statute of limitations, however, even though he introduced no proof at trial to demonstrate that any state other than Wyoming was the state in which the cause of action arose. That burden was imperative because the cause of action was *not* based on the act of intercourse; it was instead based on the negligent infection, the creation of a disease, and to prove the applicability of a statute other than Wyoming's, he had to prove that the negligent infection arose in a state other than Wyoming. Mr. Duke totally and completely failed to elicit any proof that the infection arose in a state other than Wyoming.

The Supreme Court of Wyoming assumed Mr. Duke's burden, and arbitrarily held that the cause of action arose in New York, that the New York three-year statute of limitations was borrowed, and that Miss Housen's action was time barred. The arbitrariness of that decision is patent, explicit, and so extreme that it denied Miss Housen her fundamental rights to due process and equal protection. While the arbitrary character of that decision will be discussed at length hereafter, instances of that arbitrariness can be detailed now.

The Wyoming Supreme Court stated that it cannot and will not decide any question or fact. Id at 340 (7a). It acknowledged that there was "no testimony or evidence in this case as to the exact time the plaintiff was infected by exposure to the defendant's disease." Id at 349 (28a). The Court followed with "the gonococci may have taken hold at once following the first exposure or the results delayed until some later time. We cannot guess and will not try to." (Id at 351.) (32a)

Despite these declarations, the Wyoming Supreme Court held that the cause of action arose in New York State requiring the Wyoming Court to borrow the statute of limitations of New York, which is three years. By so doing, the Court foreclosed the Petitioner's action which was brought in Wyoming under its four-year statute of limitations.

The opinion by the Wyoming Supreme Court in its arbitrariness denies Miss Housen the fundamental rights of due Process and equal protection under the law that is guaranteed to litigants within our judicial system. As noted in his dissent to the Court's order denying Miss Housen's Petition for Rehearing, Justice McClintock noted the fact that the Court had, *inter alia*, made fact findings that were "not supported by and in some cases in conflict with the uncontradicted evidence." This observation appeared in the dissent in the following context:

> The majority opinion has been a confusing and difficult one for me to read because of contradictory statements, leaving me without a clear understanding as to just what is the holding of the court. I share the concern expressed in the petition for rehearing that the majority ignore two well-established rules of this court: that it will

> grant all favorable inferences to the appellee, and that it is not the trier of the facts. I agree with counsel that not only has the majority made such findings but that they are not supported by and in some cases in conflict with the uncontradicted evidence.
>
> —590 P.2d 1340, 1341 (49a-50a)

The first instance at which the denial of the federal rights could be raised was *after* the original appellate decision was rendered because the denial arises from that decision itself. Therefore, Miss Housen timely filed a petition for rehearing and asserted a denial of the due process and equal protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution. After a lengthy discussion concerning the arbitrary nature of the court's decision, Miss Housen detailed the constitutional violations specifically.[6] The ruling by the court on her petition

[6] Miss Housen's petition for rehearing provided as follows:

> The result reached by this court violates fundamental constitutional protections guaranteed to Miss Housen by the United States and the Wyoming constitutions. The discarding of a cause of action under the circumstances discussed in this petition as well as under the circumstances discussed in Appellee's brief violate the following specific provisions:
>
> a. Article 1, Section 3 of the Wyoming Constitution dealing with equality of rights.
>
> b. Article 1, Section 6 of the Wyoming Constitution dealing with due process of law.
>
> c. Article 1, Section 7 of the Wyoming constitution dealing with the arbitrary exercise of power.
>
> d. Article 1, Section 8 of the Wyoming constitution dealing with the availability of courts for redress.
>
> e. Article 1, Section 9 of the Wyoming constitution dealing with trial by jury.

evidenced that the court had considered her arguments; the order denying rehearing held that the petition was denied "after full consideration." Id at 1340 (49a)

REASONS FOR GRANTING WRIT

The action by the Wyoming Supreme Court constitutes arbitrary, capricious, and unreasonable action that denied Petitioner, Margaret Housen, her fundamental rights to due process of law and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. As recognized by Justice McClintock in his dissent, the Wyoming Supreme Court deviated from established appellate procedure, shifted burdens of proof that were properly upon the defendant to Margaret Housen, made factual determinations that were in conflict with the evidence, and *explicitly* engaged in conduct that it had within the majority opinion *explicitly* disavowed. This deviation

> f. Amendment 5 to the United States constitution dealing with due process of law.
>
> g. Amendment 7 to the United States constitution dealing with trial by jury.
>
> h. Amendment 14 to the United States constitution dealing with due process of law and the equal protection of the laws.
>
> An individual's cause of action is a property right that must be treated fairly and decently. It must not be made the subject of "special" appellate rules that are not reserved for other causes of action. If this court is not going to make factual determinations for other causes of action, then it must not do so for Miss Housen. If this court is not going to grant the *appellant* the evidentiary presumption for other causes of action, then it must not grant that presumption to Mr. Duke. If this court is going to require defendants in other cases to prove their affirmative defenses, then it must do so in this case.

from established procedure, and Margaret Housen's unique treatment by the Wyoming Supreme Court, was not founded on any rational basis. She was, quite simply, not treated properly by that Court, and the treatment was of such a gross nature that it violated her fundamental rights. Because the petition for rehearing was denied (over the strong dissent of Justice McClintock), Margaret Housen's only recourse is with this Court.

I. The State Supreme Court has an Obligation to Protect Rights Granted by the United States Constitution.

It is incumbent upon the supreme courts of the several states "to guard, enforce, and protect every right granted or secured by the Constitution of the United States." This principle has been firmly established by this Court for almost a century. *Robb* v. *Connolly,* 111 U.S. 624, 28 L.ed 542, 546, 4 S.Ct. 544 (1884). It has been given emphasis in current times in the case of *Irvin* v. *Dowd,* 359 U.S. 394, 79 S.Ct. 825 (1959) 3L.Ed. 2nd. 900.

The due process and equal protection obligations imposed on state courts protect against unreasonable or arbitrary action. For instance, this court has held that a state judicial procedure can be neither unreasonable nor arbitrary. *Hardware Dealers Mutual Fire Insurance Company of Wisconsin* v. *Glidden Company,* 284 U.S. 151, 76 L.Ed 214, 219, 52 S.Ct. 69 (1931). Justice Cardozo commented on the protection afforded to state court litigants by the Fourteenth Amendment:

> In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. . . . To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action.
>
> —*Roberts* v. *New York,* 295 U.S. 264, 79 L.Ed 1429, 1435

In the case of *Sexton* v. *Barry,* 233 F.2d 220 (6th Cir. 1956), Cert. den. 352 U.S. 870, 1 L.Ed. 2d 76, 77 S. Ct. 94, a plaintiff appeared *pro se* in an action against certain Ohio judges that he claimed had violated his rights. Although the Court found that no discrimination occurred, the Sixth Circuit Court of Appeals emphasized the following precept of the equal protection clause,

> The equal protection of law implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination.
>
> —Id at 224

More recently, this Court has determined these rights to be "fundamental" protection:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, those avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.
>
> —*Rinaldi* v. *Yeager,* 384 U.S. 305, 16 L.Ed 2d 577, 581, 86 S.Ct. 1497 (1966)

Thus, the *state courts* have a clear duty to administer justice in a manner that offends neither the due process nor the equal protection clauses of the United

States Constitution. Equally important, however, is the responsibility of the United States Supreme Court to exercise its judgment in respect to state court proceedings to determine if such constitutional protections have been abridged. Accordingly, this Court reversed a state criminal conviction, and in the process of mandating that reversal, stated as follows:

> However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."
>
> —*Rochin* v. *California*, 342 U.S. 165, 96 L.Ed. 183, 188, 72 S.Ct. 205 (1952)

We respectfully submit that the actions of the Wyoming Supreme Court offend the canons of decency and fairness and, in fact, discriminate against the petitioner. Its ruling erasing the petitioner's cause of action was not based on a fair interpretation of the merits of the case. This is apparent from the extremes the court went to in arriving at its conclusions, extremes which clearly violated all existing rules of appellate practice.[7] Where does one go when the highest court in the state takes this action, without precedent and without an opportunity to be heard? This court stands as the final arbiter and protector of this petitioner's rights. We respectfully submit that this court too has its responsibility.

[7] Most salient was the ruling by the Wyoming Supreme Court denying the petitioner's cause of action under Nebraska law. The four-year statute of that State, where the parties had sexual relations, was held by the court to be not applicable because petitioner had not learned of her infection by respondent in that state. Such a ruling would require that no cause of action would exist for a tort or crime unless one learned in the same state that he was the victim of another's actions.

The United States Supreme Court must jealously protect the rights of individuals and their entitlement to due process and equal protection under the law. This Court is the only hope and protection left for the petitioner in upholding the verdict that the jury, in Cody, Wyoming, determined to be fairly valued at more than one million dollars.

II. The Determination of Facts by the Wyoming Supreme Court Without Basis in the Trial Record and Even Directly Contradictory to the Evidence is Contrary to the Established Procedures of the Wyoming Supreme Court and Fundamental Principles of Law.

Margaret Housen's case was tried by a duly empaneled, attentive jury in a small town in Wyoming. That jury returned a substantial verdict in favor of the plaintiff, and in the process answered the special interrogatories referred to earlier in this petition. The verdict was based on evidence introduced at the trial. The decision by the Wyoming Supreme Court, on the other hand, was wholly a creation of the appellate court. As pointed out by Justice McClintock, the facts "determined" by the majority were in some instances not supported by and in conflict with the *actual* evidence.

The majority, thereby, erred in not following the oft-repeated rule that it is not an appellate court's function to determine the facts and the law in a case

in the first instance. That must be done by the trial court. *Buckman* v. *United Mine Workers of America*, 339 P.2d 398, 402 (Wyo. 1959). This principle has also been recognized by this court. *International Terminal Operating Co.* v. *N. V. Nederl. Amerik Stoomv. Maats*, 393 U.S. 74, 21 L.Ed.2d 58, 60, 89 S.Ct. 53, amended decision 393 U.S. 995, 21 L.Ed.2d 461, 89 S.Ct. 482 (1968); *Baltimore and Carolina Line* v. *Redman*, 295 U.S. 654, 79 L.Ed. 1636, 1638 (1935).

The determinations made by the Wyoming Supreme Court included the following:

> a. As if ignoring the uncontradicted evidence that the parties had sexual relations in a number of states, the Wyoming Supreme Court focused selectively on the events in New York City. The court stated that on April 8, 1970, in New York City, Pony Duke introduced into the body of the plaintiff, infectious pus producing bacteria known as gonococci, which causes the disease of gonorrhea." (Majority Opinion, page 346 (20a, 21a)). Within the same paragraph, the majority expanded its factual determinations by finding that, "on the morning of April 21, 1970, the defendant once again at a hotel in New York City, New York, repeated the tortious act and once again in the same fashion introduced into the body of the plaintiff the bacteria of gonococci." Id. at 346 (21a). These alleged statements of fact required the Wyoming court to have a body of knowledge that was not presented at the trial. They represent determinations made by this court on the basis of evidence developed and known only by that court. Moreover, the assumption by the court that New York City was the site of infection was in direct conflict with the medical testimony introduced at the trial that there could be a delay in the commencement of the infection even assuming an infectious contact. Medically, no state could be determined to be the location where petitioner was infected.

> b. The majority stated as follows: "We find and hold that a cause of action arose in the State of New York on April 8, 1970, and April 21, 1970." (Majority Opinion, Page 345). It would be difficult to conceive a more explicit factual finding than this one. The initiative of the majority was in complete conflict with the answer provided by the jury to Interrogatory No. 1. By stating affirmatively that Mr. Duke was infected with gonorrhea during the period of April 4, 1970 through April 21, 1970, the jury was unable to make a medical determination of the location at which the infection was contracted which was accomplished by the Wyoming Supreme Court.
>
> c. The court determined the multiple contacts in New York gave rise to two causes of action, either of which could have been pursued in New York within three years. This determination is similar to the application of the multiple publication rule in a libel case. However, the court then did not grant recognition to the other "publications" that occurred in other parts of the United States. This picking and choosing of "publications" arbitrarily denies Margaret Housen of her property right to a claim against Pony Duke.
>
> d. Specifically the majority ignored the fact that sexual intercourse in Nebraska on April 10, 11 was as likely as New York to be the locaton that gonococci was, as the court stated, "introduced into the body of the petitioner."
>
> e. On page 352 the majority refused to apply the Nebraska four-year statute of limitations despite the fact that there had been an admission by the defendant that the parties had sexual relations in that jurisdiction. The majority held that the

Nebraska cause of action arose in Washington, D. C. since that was where the presence of gonorrhea in the plaintiff was confirmed. (589 P.2d 352). On that same page, the court foreclosed Washington, D.C. as the place where a cause of action arose because "no tortious act was committed there". The court made this factual determination despite its holding on the prior page, 351, "that gonococci may have taken hold at once following the first exposure or the results delayed until some later time. We cannot guess and will not try to"

III. The Appellate Court Contrary to Its Own Rules of Procedure, Applied to Other Litigants, Relieved the Respondent of the Burden of Showing the Applicability of the Borrowing Statute and of Proving the Affirmative Defense of the Statute of Limitations.

As Justice McClintock properly pointed out in his dissent, the majority relieved Pony Duke of the burden of proving the applicability of the borrowing statute. There is absolutely no question at all that the law of the forum, namely, Wyoming, is controlling for purposes of the statute of limitations. *Union Stockyards Nat. Bank of South Omaha* v. *Maika*, 16 Wyo. 141, 92 P. 619 (Wyo. 1907); *Riley* v. *Union Pacific Railroad Co.*, 88 F. Supp. 391 (D.C. Wyo. 1950) affirmed 182 F. 2d 765 (10th Cir. 1950). The *lex fori* rule can be modified only if a borrowing statute is shown to be applicable. The defendant did not do so, and the Wyoming Supreme Court cannot shoulder that burden for him or pass it arbitrarily to Margaret Housen.

This is a matter of proof for the party asserting the

claim, namely the defendant:

> The party pleading the statute of limitations has the burden of proving that the action is barred.
>
> —*Garland* v. *True Temper Corporation.* 354 F. Supp. 328, 330 (D.C.W. Va. 1973)

See Also, 5 Am Jur *Trials* 441, Section 63 at 582; *Ray* v. *Oklahoma Furniture Mfg. Co.*, 40 P.2d 663 (Okla. 1934); *Swearingin* v. *Rendigs*, 4 N.E.2d 695 (Ohio 1935); *Wahl* v. *Cunningham et al*, 6 S.W. 2d 576 (Mo. 1928).

The burden upon defendant Duke to prove the bar of the statute of limitations is underscored in Wyoming by the Wyoming Rules of Civil Procedure. Rule 8(c) leaves no room for doubt that the statute of limitations is an *affirmative defense* that not only must be asserted by the defendant. The failure to do so will constitute a waiver of the defense.

On page 342 of the majority opinion, it stated that Margaret Housen "elects to ignore the borrowing statute." Let it be emphatically stated to this Court that Miss Housen did not "elect", choose, or in any other manner, ignore the borrowing statute. Let it be said emphatically, moreover, that Pony Duke did absolutely nothing to make that statute applicable to this case because he completely and utterly failed to prove the application of the statute. To trigger the borrowing statute requires the defendant to prove "where the cause of action arose." Section 1-25, W.S. 1957. He simply failed to make such proof. The majority's statement that Miss Housen "ignores" the application of the borrowing statute has the same attraction as a statement in an automobile accident case where an appellate court reverses a jury finding

of negligence after the defendant neither pleaded nor proved contributory negligence for the reasons that the *plaintiff* ignored the affirmative defense. A plaintiff in any tort litigation has a sufficient burden without a Court placing the additional burden of the defendant's affirmative defenses on his or her shoulders.[8]

The burdens taken from Mr. Duke are even more far-reaching. The majority opinion held that the Nebraska four year statute of limitations was not applicable. Justice McClintock took particular exception to this factor in both of his dissents. (589 P.2d 354) (39a, 41a-42a) (590 P.2d. 1341) (50a-51a)

The majority at one point in its opinion seemed to hold that discovery of a cause of action is an event that can be forum determinative. The concurring opinion places such emphasis on that theory that it argued that Washington, D.C. should be held to be the jurisdiction where the cause of action arose even though there is no evidence that sexual relations occurred there, and even though there is no one who can say whether the infection started there. (589 P.2d at 353) (36a)

The discovery of a tort has the effect of determining the date *when* the statute begins to run rather than *where* the statute begins to run. (See Dissent of Jus-

[8] An application of the holding of *Hicks* v. *U.S.*, 368 F.2d 626, (4th Cir. 1966), where the defendant's negligence produced an uncertainty regarding critical times and events, would be apposite in the instant case. The respondent's concealment of his disease while he exposed the petitioner to infection in a number of jurisdictions would place upon him the burden of showing where and when the infection took place. See also *Daniels* v. *Hadley*, 566 F.2d 749 (D.C. Cir. 1977) and *Graham* v. *Roberts*, 441 F.2d 995 (D.C. Cir. 1970).

tice McClintock.) Id at 354 (38a, 39a). This factor becomes important because the majority summarily eliminates Nebraska's four year statute of limitations by using the discovery concept to jump to Washington, D.C.: "If the Wyoming discovery rule, footnote 8, is followed, then the cause of action as to Nebraska arose in Washington, D.C. where the presence of gonorrhea in plaintiff was confirmed." (Majority Opinion, page 352.) (34a) This misconstrues the function of discovery of a tortious offense on one's person. *It starts the clock but it does not determine the state in which the clock will start ticking.*

The summary treatment given to the Nebraska four year statute is inappropriate. *There can be no question that had the only sexual contact between Miss Housen and Mr. Duke occurred in Nebraska on April 11, 1970, and that the discovery occurred on April 20, or April 21, Miss Housen would have had a cause of action against Mr. Duke.* How can The Wyoming Supreme Court eliminate this cause of action? The majority simply ignores the Nebraska statute and in so doing deprives Miss Housen of the constitutional rights discussed herein.

The reasoning behind this conclusion rests on the fact that the *lex fori* is controlling unless the *defendant* can prove the applicability of the borrowing statute. As mentioned earlier, that is the defendant's burden and it has not been met. As to the Nebraska statute, the defendant would not only have to show that the cause of action *did not arise in Nebraska* but *he* would have to *prove* where the cause of action *did* arise. That has not been done and it is improper for the Wyoming Supreme Court to attempt to shoulder Mr. Duke's burden on the appellate level, particularly

when the evidence presented at the trial level did not justify any finding by this Court that the cause of action accrued in a state other than the State of Wyoming.

IV. The Appellate Presumption That Evidence Must Be Viewed in a Light Most Favorable to the Prevailing Party Was Violated in the Majority Opinion.

The Wyoming Supreme Court has consistently maintained that all evidence must be viewed in the light most favorable to the prevailing party. *Overcase* v. *Baldwin*, 544 P. 2d 464, 465 (Wyo. 1976). This principle of appellate procedure has necessitated the rule that the Wyoming Supreme Court must "leave out of consideration entirely evidence of the unsuccessful party, in conflict therewith; and give to the evidence of the successful party every favorable inference which may be reasonably and fairly drawn from it." *Zitterkop* v. *Roussalis*, 546 P. 2d 436, (Wyo. 1976)

Even the majority opinion affirmed this guiding principle of appellate practice with the following statement:

> Whenever we refer in this opinion to dates, places or circumstances, such reference will be derived entirely from the evidence of the plaintiff, undisputed facts and answers of the jury to interrogatories propounded by them. We will disregard any evidence of the defendant in conflict.
>
> —Majority Opinion, page 340. (7a)

After making the above statement, however, the majority proceeded to construe the evidence in the light most favorable to Mr. Duke. Examples of this

reversal of the presumption are the following:

> The majority simply ignored the jury's determination as reflected in its Answer to Interrogatory No. 1. In that interrogatory the jury answered affirmatively the question "Do you find that the Defendant was infected with gonorrhea during the period of April 4, 1970, through April 21, 1970?" Thus, the jury only determined that the infection occurred *sometime* during that time period; further clarification of the occurrence was not possible, *nor was further clarification revealed by the evidence.* Yet, in spite of the jury's declaration, and in spite of the absence of evidence shedding further light on this point, the majority opinion declared that "We *find* and *hold* that a cause of action arose in the State of New York on April 8, 1970, and April 21, 1970."
>
> —(Majority Opinion, Page 345 (18a), emphasis added)

The evidentiary judgment which the majority made unfavorably to Miss Housen was placed in sharp focus by the court's own language later in the opinion. On Page 351 the court said "in this case there is no proof as to just when plaintiff was actually infected—the only medically certain inference is that she had gonorrhea in New York on April 21, 1970. The gonococci may have taken hold at once following the first exposure or the results delayed until some later time. We cannot guess and will not try to." (Page 351) (32a) In spite of this declaration by the Court, the evidentiary assumptions mentioned earlier were made to support the court's *finding* and *holding* on Page 345 (18a) that the cause of action arose in New York and the evidentiary conclusions that the tort was committed and the infection introduced into the body of the Plaintiff in New York. (Page 346) (21a)

Margaret Housen petitions this Court not in the posture of a litigant who merely lost her case on appeal. Instead, she petitions this Court as a litigant who had a valid cause of action, and a proper jury verdict, wrested from her in an arbitrary and unreasonable manner

An individual's cause of action is a right that must be treated fairly, equally, and with the protections of due process. It must not be made the subject of "special" appellate rules that are not applied in other cases. If the Wyoming Supreme Court is not to make factual determinations for other causes of action, then it must not do so for Margaret Housen. If the Wyoming Supreme Court is not going to grant the appellant the evidentiary presumption for other causes of action, then it must not grant that presumption to Respondent Duke. If the Wyoming Supreme Court is going to require defendants in other cases to prove their affirmative defenses, then it must do so in this case.

The judgment of the Wyoming Supreme Court violates the constitutional protections granted to Margaret Housen by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons the Court should grant the petition and issue a Writ of Certiorari to the Supreme Court of Wyoming.

Respectfully submitted

ROBERT J. STANFORD
Attorney for Petitioner

APPENDIX

APPENDIX A

"SUPREME COURT OF WYOMING.

No. 4811.

"PONY" DUKE,
Appellant (Defendant below),
v.

MARGARET HOUSEN,
Appellee (Plaintiff below).

Jan. 12, 1979.

Rehearing Denied March 2, 1979.
See 590 P.2d 1340.

Robert A. Gish, Basin, and R. R. Bostwick, Casper, signed the briefs. R. R. Bostwick, Casper, appeared in oral argument on behalf of appellant.

G. L. Spence, Casper, signed the briefs and appeared in oral argument on behalf of appellee.

Before RAPER, C. J., and GUTHRIE, McCLINTOCK and THOMAS, JJ., and ARMSTRONG, D. J., Retired.

RAPER, *Chief Justice.*

In the appeal now before the court, appellant-defendant challenges the jury verdict and district court judgment entered against him awarding to appellee-plaintiff, based upon defendant's alleged grossly negligent infection of plaintiff with venereal disease, compensatory and punitive damages in the sum of $1,300,000. Through this appellate challenge, defendant raises the following questions:

1. Is the action barred by a statute of limitations?
2. Are the damages excessive?
3. Is the defense of assumption of risk or other defense a bar to plaintiff's recovery as a matter of law?

4. Was there reversible error in the admission of the testimony of Janet Woodenlegs?

5. Were the instructions on punitive damages improper?

6. Was there plain and fundamental error?

For the reasons stated in detail herein, we shall reverse on the ground that the action is barred by the statute of limitations and not consider the other issues.

In early *April, 1970,* plaintiff was living, working, and going to college part-time in the Washington, D.C. area. On *April 4* of that year she was introduced by her brother to defendant; and on the same night and early morning of April 5, following dinner and dancing plus moderate drinking, engaged in sexual intercourse with defendant in the front seat of his pickup truck. On April 8th, at least partially in response to defendant's sudden and convincing professions of love and desire to marry, plaintiff met defendant at the LaGuardia airport in New York and subsequently traveled by truck with him from New York to Denver, Colorado, engaging on and off in acts of sexual intercourse with defendant along the way. Upon reaching Denver, defendant, having lost interest in plaintiff, lodged her in a local hotel and left for his home in Meeteetse, Wyoming. Plaintiff, after contacting her brother and waiting for him to arrive, subsequently traveled to Meeteetse and confronted defendant concerning his behavior. As a result, it was agreed that defendant would accompany plaintiff and her brother back to Washington, D.C. and apologize to the family; yet after arriving in Washington and discussing the situation with her family, plaintiff for some reason which is neither totally clear nor probably capable of elucidation, accompanied the defendant to New York, there occupying a hotel room together and engaged once more in sexual intercourse with him. Finally, on the morning of *April 21, 1970,* defendant broke off his relationship with the plaintiff and informed her for the first time

that he had venereal disease, gonorrhea, and that now she probably had it too.

At trial, through the presentation of voluminous testimony by both parties, it was established that at some time prior to *March 22, 1970,* defendant had become aware that he was probably infected with venereal disease for on that day he visited a doctor in Dallas, Texas, complaining of pain and a urethral discharge. In response, the examining physician took a sample of the discharge for testing and administered a large dosage of fast-acting penicillin, telling defendant to return the next day for the test results. When defendant returned on *March 23, 1970,* the test results for gonorrhea having been found positive, a larger dose of a longer-acting penicillin was administered and defendant was advised to see his own doctor for further treatment. Defendant then left by plane for New York, arriving the same day, *March 23,* where immediately upon arrival he contacted his own physician, who after an external examination, stated that he could find no "clinical evidence of gonorrhea"—defendant had no current urethral discharge. On the basis of the previous treatment and this current information, defendant asserted at trial that it was his belief that as of his first sexual contact with the plaintiff on the night of *April 4-5, 1970,* his infection with gonorrhea had been cured.

Plaintiff, after being told by defendant on *April 21, 1970,* that she had probably contracted gonorrhea from him and should see a doctor, left New York for Washington, D.C. and, the following day, *April 22, 1970,* visited her personal physician who through a smear test confirmed that gonorrhea was present. In response to medication, plaintiff's infection with what her physician described as a "classic case of asymptomatic gonorrhea" was arrested by *May 14, 1970,* but more serious problems were to develop. Beginning in *January, 1973,* plaintiff noticed a pain in her lower right side which by *March, 1973,* had become so severe and constant as to require medical attention. After various

external medical tests provided negative results and antibiotic medication proved ineffective, major exploratory surgery was performed in *July, 1973.* As a result, plaintiff's physician found that because of the gonorrhea infection, and possibly other related secondary infections as well, scar tissue adhesions had formed within a number of areas of appellee's lower abdomen. He testified that although he had lysed (loosened or detached by surgical procedures) the adhesions, thus somewhat relieving temporarily the severe pain, because of the nature of the scar tissue involved, new adhesions would eventually form and the pain would very probably return again and continue in this cyclical manner for the remainder of plaintiff's life. He further advised that because of the scarring involved, plaintiff's ability to bear children had been greatly reduced.

This case is not the first lawsuit filed by the plaintiff against defendant. The record discloses that on April 5, 1971, a complaint was filed in a case entitled *Margaret Housen* v. *Angier St. George Biddle Duke, Jr.,* Civil No. 8557, in the District Court, Fifth Judicial District, Park County, Wyoming, which recited the relationship between plaintiff and defendant with dates and events consistent with plaintiff's testimony in the instant case, including the following:

> "(6) That the Plaintiff did thereafter learn that she had contracted from Defendant a venereal disease, as a result of which the Plaintiff was subjected to medical expense for the care and treatment thereof, together with great pain, suffering, disgrace and humiliation in the eyes of her family and friends.
>
> "(7) That the Defendant, at the times and places aforesaid, and knowing that he was infected with a communicable venereal disease, did then and there negligently, carelessly, and with utter and wanton disregard for the rights of the Plaintiff, expose and transmit to the Plaintiff an infectious venereal disease.
>
> "(8) That as a proximate result of the negligent and careless acts of the Defendant, as aforesaid, the Plaintiff has suffered damages, and will continue to suffer damages from her humiliation and disgrace as aforesaid, damages in the sum of $100,000.00.
>
> "WHEREFORE plaintiff prays judgment against the defendant as follows:
>
> "(a) For general damages for her medical expenses, pain, suffering, disgrace and humiliation in the sum of $100,000.00;
>
> "(b) For punitive damages in the sum of $100,000.00;
>
> "(c) For her costs incurred in this action; and
>
> "(d) For such other and further relief as to the Court may seem just and proper."

That complaint is noticed by the trial judge in two of his orders. That case was later dismissed.

Plaintiff filed this new action on *April 19, 1974,* seeking hospital expenses, doctor's expenses, wage loss, future medical expense, as well as damages for pain and suffering, present and future. In addition, based on an allegation that defendant was guilty of gross negligence when he infected her with gonorrhea, plaintiff requested $1 million in exemplary damages. By interrogatory, the jury found that defendant had been infected with gonorrhea at the time of his relations with plaintiff between *April 4 and April 21, 1970;*[1] and by verdict awarded plaintiff

[1] Interrogatories to the jury and its answers were:

> "*Interrogatory No. 1:* Do you find that the Defendant was infected with gonorrhea during the period of April 4, 1970 through April 21, 1970? /s/Yes

$300,000.00 in compensatory damages, and $1,000,000.00 in exemplary or punitive damages. Following denial of various posttrial motions, the appeal herein was filed.

By way of both the answer filed in response to plaintiff's complaint as well as by motions prior, during and after trial, defendant alleged and strongly argued that based upon applicable statutes and case law, plaintiff's cause of action had been barred by the passage of time and her complaint should therefore be dismissed. Rule 8(c), W.R.C.P. requires that the statute of limitations be specifically set forth as an affirmative defense. In response, the trial judge ruled that inasmuch as plaintiff's scar adhesions had not been discovered until a date much later than when the infection itself had occurred, the applicable time period for limitation of action purposes was to be computed only from discovery of the adhesions; and defendant's assertion was thus denied.

Statutes of limitation have long been a part of the jurisprudence of the United States, all its states and the State of Wyoming. They are pragmatic devices to save courts from stale claim litigation and spare citizens from having to defend when memories have faded, witnesses are unavailable by death or disappearance and evidence is lost.

"*Interrogatory No. 2:* Do you find that the Plaintiff was advised on April 18, 1970 that the Defendant had or had had gonorrhea? /s/No

The purported significance of Interrogatory No. 2 is that plaintiff field her action on April 19, 1974. Defendant produced evidence that plaintiff was informed on April 18, 1970, that he had gonorrhea. If believed by the jury, that would, it was theorized as a matter of law, foreclose plaintiff under Wyoming's four year statute, § 1-3-105, W.S.1977, infra. The defendant himself denied telling plaintiff at any time that he had gonorrhea. The information purportedly was supplied to plaintiff by friends of the defendant. We need not consider what its effect might have been because it would raise only an academic question.

Statutes of limitation are arbitrary by their very nature and do not discriminate between the just and unjust claim. They are not judicially made but represent legislative and public policy controlling the right to litigate. *Chase Securities Corporation* v. *Donaldson,* 1945, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628; reh. den. 325 U.S. 896, 65 S.Ct. 1561, 89 L.Ed. 2006. The statutes operate against even the most meritorious of claims and courts have no right to deny their application. *In re Smith's Estate,* 1949, 240 Iowa 499, 36 N.W. 2d 815, 8 A.L.R.2d 640. When considering the statute of limitations, the nature of injury, its extent, the amount of money damages involved, social considerations, and the emotional appeal the facts may have must pass to the background. The circumstances are only significant in the bearing they may have on where the cause of action arose, when it arose and when the time expired for pursuing the applicable judicial remedy.

Wherever we refer in this opinion to dates, places, or circumstances, such reference will be derived entirely from the evidence of the plaintiff, undisputed facts and answers of the jury to interrogatories propounded to them. We will disregard any evidence of the defendant in conflict. There is therefore left only a question of law to decide. We cannot and will not decide any questions of fact.

At the very foundation of plaintiff's claim against defendant lie the principles of the law of tort. One who negligently exposes another to an infectious or contagious disease, which such other person thereby contracts, can be held liable in damages for his actions. *Earle* v. *Kuklo,* 1953, 26 N.J. Super. 471, 98 A.2d 107 (tuberculosis); *Edwards* v. *Lamb,* 1899, 69 N.H. 599, 45 A. 480 (infection from a wound); *Kliegel* v. *Aitken,* 1896, 94 Wis. 432, 69 N.W. 67 (whooping cough); *Franklin* v. *Butcher,* 1910, 144 to. Mo. App. 660, 129 S.W. 428 (smallpox). Yet while the basic claim raised by plaintiff, albeit an unusual one, sounds in tort, the circumstance of its pursuance in Wyoming is

somewhat unique. Since, as the evidence points up, there was no sexual contact between plaintiff and defendant in Wyoming, nor any tortious injury in this state, simple logic reveals that there could be no tortious conduct, no negligent exposure of plaintiff's body to disease by defendant in this, the forum state. There can be no question that plaintiff's cause of action could only be found as having arisen elsewhere.

An actionable tort is made up of several elements. A cause of action must arise before limitations start. Prosser, Torts, 4th Ed., § 30, pp. 143-44, outlines the steps:

> "Negligence, as we shall see, is simply one kind of conduct. But a cause of action founded upon negligence, from which liability will follow, requires more than conduct. The traditional formula for the elements necessary to such a cause of action may be stated briefly as follows:
>
> "1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
>
> "2. A failure on his part to conform to the standard required. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.
>
> "3. A reasonable close causal connection between the conduct and the resulting injury. This is what is commonly known as 'legal cause,' or 'proximate cause.'
>
> "4. Actual loss or damage resulting to the interests of another. Since the action for negligence developed chiefly out of the old form of action on the case, it

> retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred. The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.
>
> * * * * * *
>
> "It follows that the statute of limitations does not begin to run against a negligence action until some damage has occurred.
>
> * * * * * *"

(Footnotes omitted.)

A "cause of action" is the fact or combination of facts which give rise to a "suit", the latter being a proceeding to enforce a right. *State ex rel. Merritt Oil Corporation* v. *District Court of Sixth Judicial District In and For Converse County*, 1932, 44 Wyo. 437, 13 P.2d 568, 570, cert. den. 287 U.S. 667, 53 S.Ct., 291, 77 L.Ed. 575. This court very recently in *Cantonwine* v. *Fehling*, Wyo. 1978, 582 P.2d 592, a promissory note case, with approval quoted from *Bruner* v. *Martin*, 1907, 76 Kan. 862, 93 P. 165, 166:

> "* * * But the time when the cause of action arises determines also the place where it arises; for when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises. * * *"

The heavy weight of authority in interestate tort cases such as here with elements in different jurisdictions, is that the law of the place where the plaintiff sustains injury to her person controls. Restatement of Conflict of Laws, § 377; 2 Harper and James, § 30.4, p. 1961.

At common law, the limitation period of the forum jurisdiction, the lex fori, generally controlled the time within which causes of action had to be pursued, regardless of the fact that the cause itself in all its elements may have accrued outside the forum jurisdiction. Only when the limitation of action statute of the foreign jurisdiction in which the cause arose could be deemed substantive law rather than procedural would the foreign statute be applied by the forum court. *Parish* v. *B. F. Goodrich Co.*, 1975, 395 Mich. 271, 235 N.W.2d 570; Ehrenzweig, Conflict of Laws § 161 (1962); Vernon, Statutes of Limitation in the Conflict of Laws; Borrowing Statutes, 32 Rocky Mtn.L.Rev. 287 (1960). In order to avoid the confusion and problems associated with attempting to determine when a foreign limitation of action statute was substantive or procedural, a majority of states, including Wyoming, enacted what are referred to as "borrowing" statutes. Section 1-3-117, W.S.1977,[2] which we find to be controlling in this regard, is simple and clear:

> "If by the laws of the state or country where the cause of action arose the action is barred, it is also barred in this state."

[5] The plaintiff takes an unusual position that since the case is tried in Wyoming, it must be tried under Wyoming law as a whole, including § 1-3-105, W.S.1977,[3] prescribing a period of limitation of four years "after the cause of action accrues," pertaining to causes of action arising in Wyoming. She then asserts that under the statutory section, since she discovered she was infected with gonorrhea "around April 22, 1970," her action was timely brought within the Wyoming four year period by filing her complaint on April 19, 1974. She elects to ignore the borrowing statute, § 1-3-117, supra. She then relies upon *Union Stockyards Nat. Bank of South Omaha, Nebraska* v. *Maika, 1907, 16 Wyo. 141, 92 P. 619; and Riley* v. *Union Pacific Railroad Co.*, U.S.D.C. Wyo.1950, 88 F.Supp. 391, aff'd. 10th Cir. 1950, 182 F.2d 765 to support a 51 Am. Jur.2d, Limitation of Actions, § 66, p. 645 statement as follows:

> "* * * the statutes of limitation of the place where the action is brought and the remedy is sought to be enforced, and not those of the place where the contract was made, the right in tort arose, or the plaintiff resides, or of the domicil of one or the other of the persons affected by the litigation, control in the event of a conflict of laws. * * *"

We have no argument with that rule in the case before us but we have no conflict of laws to make it applicable. Any conflict has been erased by the legislature by enactment of the "borrowing" statute fixing the statute of limitations of this state to be the same as that of the jurisdiction in

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[2] The only change since enacted by the Ninth Legislative Assembly of the Territory of Wyoming as part of the Code of Civil Procedure by § 43, Chapter 60, Session Laws of Wyoming Territory, 1886, has been to change the last word of the provision from "territory" to "state." Since, it has appeared as: R.S.1887, § 2379; R.S.1899, § 3464; C.S.1910, § 4308; C.S.1920, § 5577; R.S.1931, § 89-419; C.S.1945, § 3-520, W.S.1957, § 1-25; Laws 1977, ch. 188, § 1.

[3] Section 1-3-105, W.S.1977, in pertinent part provides:

"(a) Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action accrues:

* * * * * *

"(iv) Within four (4) years, an action for:

* * * * * *

"(C) An injury to the rights of the plaintiff, not arising on contract and not herein enumerated; and

* * * * * *

which the cause of action arose. That is explained in the next section (67) of the Am.Jur.2d, supra, quote. The limitations law of the jurisdiction in which a cause of action arises is the law of this state and has been ever since territorial days, even though a defendant is properly before a Wyoming court, the place where he may be personally served with process and a remedy found.

The position we take in this case is entirely consistent with the past utterances of this court with respect to causes of action arising outside the state of Wyoming. It was declared to be the law of this state, in *Ball* v. *Ball*, 1954, 73 Wyo. 29, 269 P.2d 302, 304, quoting from 15 C.J.S. Conflict of Laws § 12, p. 897 (now 15A C.J.S. Conflict of Laws § 12(2) pp. 453-455):

> "It is thoroughly established as a general rule that the lex loci delicti, or the law of the place where the tort or wrong has been committed, is the law that governs and is to be applied with respect to the substantive phases of torts or the actions therefor, and determines the question of whether or not an act or omission gives rise to a right of action or civil liability for tort, * * *.' "

That rule is likewise in tune with the legislative policy of the state announced in its limitations "borrowing" statute. *Cope* v. *Anderson*, 1947, 331 U.S. 461, 67 S.Ct. 1340, 1343, 91 L.Ed. 1602, points out that the bottom line purpose of a state's borrowing statute is to require its courts to bar suits if the right to sue had already expired in another jurisdiction where the crucial combination of circumstances giving the right to sue had taken place, the existence of which affords a party a right to judicial interference in his behalf.

Plaintiff also argues, and the trial judge so held, that the statute of limitations did not commence to run until October, 1973, when adhesions resulting from the infection were discovered because it is the injury therefrom for

which the damages are sought.[4] That position is not the accepted rule. The correct rule is very well summarized in 51 Am.Jur.2d, Limitation of Actions, § 135, p. 704:

> "* * * As a general rule, where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not required that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that

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[4] The full text of the trial judge's order in regard to dividing damages to control the running of limitations:

> "THIS MATTER, having come on to be heard by the Court on a conference call between the parties, the Court having heard the arguments of counsel and being fully advised in the premises, finds with respect to the application of the Statute of Limitations in this case, as follows:
>
> "1. That there is no question in the Court's mind but what Wyoming law pertaining to the Statute of Limitations is based upon discovery of the injury;
>
> "2. Therefore, the Court finds that if the evidence supports said statements, the Statute did not begin to run insofar as the adhesions were concerned until 1973;
>
> "3. That in reviewing the original case which was filed April 5, 1971 and the present complaint, paragraph 2 thereof, there is no question but what the Plaintiff knew immediately after the incidents in question that she had been infected, and therefore the Court finds that insofar as any recovery for humiliation, etc for the alleged infliction of the disease, is barred by reason of the Statute of Limitations.
>
> "IT IS THEREFORE ORDERED BY THE COURT:
>
> "1. That the Statute of Limitations did not begin to run insofar as the adhesions were concerned, until 1973;
>
> "2. That recovery for humiliation, etc. for the alleged infliction of the disease, is barred by reason of the Statute of Limitations."

> the actual or substantial damages do not occur until a later date. The act itself is regarded as the ground of the action, and is not legally severable from its consequences. * * *"[5]

The doctrine is well supported by voluminous authority. We have selected some examples involving physical injury. By various ways and expressions they illustrate the rule. A cause of action accrues only when forces wrongfully put in motion produce injury. *Schwartz* v. *Heyden Newport Chem. Corp.*, 1963, 12 N.Y.2d 212, 237 N.Y.S.2d 714, 188 N.E.2d 142, 4 A.L.R.3d 814, cert. den. 374 U.S. 808, 83 S.Ct., 1697, 10 L.Ed.2d 1032 (substance later learned to be dangerous injected in plaintiff's sinuses; discovered to be cause of cancer after limitation had run; plaintiff lost an eye as a result; action barred). A single act of negligence creates only one cause of action and damage arising years later from that act of negligence does not create a new cause of action. *Schmidt* v. *Merchants Despatch Transportation Company*, 1936, 270 N.Y. 287, 200 N.E. 824, 104 A.L.R. 450 (pneumoconiosis).

The statute of limitations attaches when there has been notice of the invasion of a legal right of the plaintiff, even though notice of its consequences does not materialize until later. *Cristiani* v. *City of Sarasota*, Fla.1953, 65 So.2d 878 (child struck violently about head by negligence of another, blindness developing as a result after statute had run; recovery denied). See also, *Nardone* v. *Reynolds*, Fla.1976, 333 So.2d 25, citing *Cristiani*. In *Dowling* v. *Lester*, 1946, 74 Ga.App. 290, 39 S.E.2d 576, the defendant restauranteur was negligent in serving food containing a rock to plaintiff, which she bit down on resulting in a broken tooth, the rest of which was immediately extracted by a dentist and replaced with a denture attached to an

[5] See also Anno. 4 A.L.R.3d 821, 830, § 4 entitled "Statute of Limitations: When Cause of Action Arises on Action Against Manufacturer or Seller of Product Causing Injury or Death."

adjoining tooth. The adjoining tooth in time came loose, soreness developed and plaintiff developed a related physical condition, an injury to her person. The action was not brought within the applicable period of limitation from the date the tooth was broken. It was held that the new extent of injury arising from complications did not start the statute running anew.

Applying Louisiana law in *Nivens* v. *Signal Oil and Gas Co., Inc.*, 5th Cir. 1975, 520 F.2d 1019, reh. den., amend., 523 F.2d 1382, cert. den. 425 U.S. 912, 96 S.Ct. 1509, 47 L.Ed.2d 763, plaintiff struck his head on a galley cabinet door suffering pain, dizziness, a red spot and swelling, later discovered to be a skull fracture with serious after effects. The Court held that the injuries could not be bifurcated and the later found complications made the subject of another and delayed prescriptive period. Where a coincidence of the negligent act and the fact of some damage occurs, the cause of action comes into being and the applicable statute of limitations begins to run, even though the ultimate damage is unknown or unpredictable. *Dalton* v. *Dow Chemical Co.*, 1968, 280 Minn. 147, 158 N.W.2d 580 (poisoning from exposure to chemical in cleaning solvent; paraplegic barred).[6] To allow successive actions as

[6] See also to the same effect: *Sanchez* v. *Wade*, Tex.Civ. App.1974, 514 S.W.2d 812. (Once patient knows condition, cause of action accrues, regardless of ignorance of extent and permanency of disease.) *Christian* v. *Daniell Battery Manufacturing Co., Inc.*, La.App.1973, 279 So.2d 214. (Plaintiff aware that he was injured and was treated; later complications did not postpone starting of limitations.) *Rankin* v. *Sowinski*, 1972, 119 N.J.Super. 393, 291 A.2d 849. (Plaintiff knew jaw injured by dentist at time of extraction of tooth; cause accrued; lack of knowledge of extent of injury does not toll the statute of limitations.) *Caudill* v. *Arnett*, Ky.1972, 481 S.W.2d 668. (Injury known; not fully aware of extent of injury until several years later discovered during exploratory surgery; barred.) *Matthieu* v. *Piedmont Natural Gas Company*, 1967, 269 N.C. 212, 152 S.E.2d 336. (Cause of action springs into existence with first

additional damages arise would nullify the statutes of limitation and defeat their very purpose.

The jury found as a fact that the defendant was the bearer of gonorrhea during the period April 4, 1970 to April 21, 1970. The plaintiff's testimony, admitted by the defendant, is that sexual intercourse between the plaintiff and defendant took place on the dates and in other state jurisdictions in accordance with an itinerary as follows:

April 4-5, 1970. State of Virginia.

April 7-8, 1970. Tuxedo, New York.

Arpil 8-9, 1970. Erie, Pennsylvania.

April 9-10, 1970. State of Iowa.

April 10-11, 1970. Ogallala, Nebraska.

April 20-21, 1970. New York City, New York.

There is no evidence of sexual intercourse taking place in the State of Wyoming. We must therefore look elsewhere for a jurisdiction in which the cause arose. While it is perhaps unusual that the defendant perpetrated his negligent acts and caused injury to plaintiff's body in several different states and which may give an appearance of complexity, an application of settled rules of tort law in the jurisdictions involved clears away any suggestion of obscurity.

The limitation of action statute of the foreign jurisdiction in which the cause in question arose is applied by the forum court irregardless of whether or not the foreign

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damage; subsequent damage does not start a new cause of action). *Street* v. *Consumers Mining Corporation*, 1946, 185 Va. 561, 39 S.E.2d 271, 167 A.L.R. 886. (Plaintiff contracted silicosis 1936, discovered 1940, died from disease 1942; running of statute not postponed by fact that substantial damage did not occur until after statute had run.)

limitation could be characterized as substantive or procedural. Thus, in almost all instances, if a plaintiff's cause of action is time-barred in the jurisdiction in which the cause of action arose, it would be barred by the passage of time in the forum court as well. Such a rule not only clears up any substantive procedural conflict problem, but eliminates as well the possibility of the plaintiff shopping for a favorable forum in which to revive a dead claim. *Long* v. *Pettinato*, 1975, 394 Mich. 343, 230 N.W.2d 550; Ehrenzweig, Conflicts of Law, § 161 (1962); Vernon, supra, 32 Rocky Mtn.L.Rev. 287. It thus becomes of acute importance in the situation at bar to specifically determine, for limitation of actions purposes, where and when plaintiff's cause of action arose. In making such a determination based upon a borrowed limitational period, in all jurisdictions having a borrowing statute, with the exception of Ohio, not only is the specific prescriptive period utilized, but all of its accouterments as well whether in the form of additional statutory provisions or interpretive judicial decisions. Ester, Borrowing Statutes of Limitation and Conflict of Laws, 15 U. of Fla.Law Rev. 33, 57 (1962). As the court in *Devine* v. *Rook, Mo.App.1958, 314 S.W.2d 932, 935,* has very aptly stated:

> "But when such [limitational] statute is so borrowed, it is not wrenched bodily out of its own setting, but taken along with it are the court decisions of its own state which interpret and apply it, and the companion statutes which limit and restrict its operation. This we think is the general law." (Bracketed material added, footnote omitted.)

Thus, in applying a "borrowed" statute, we must consider not only the borrowed limitation of action statute itself, but also any applicable tolling or other statutes as well as pertinent court cases. In effect, plaintiff's cause must be

viewed as if filed in the state where under the laws of that state a cause of action accrued.[7]

We find and hold that a cause of action arose in the state of New York on April 8, 1970 and April 21, 1970. New York City, New York was the place where the defendant committed his second and last acts of negligence in communicating disease to the plaintiff. In New York it has long been the rule that in classic actions of negligence, damage is the gist and essence of a plaintiff's cause, *Schwartz* v. *Heyden Newport Chemical Corporation*, supra, and the statute of limitations commences to run at the time injury is produced (in personal injury cases) and there is damage to the structure of the body. *Schwartz* holds that the cause of action is complete when the invasion of the body by injury takes place "independently of any actual pecuniary damage." The injury is considered a trespass upon the person of the injured plaintiff.

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[7] During the remaining course of this opinion, we shall be citing and quoting from the statutes of other states. As allowed by the law of the State of Wyoming, we shall take judicial notice of those considered. Section 1-12-302, W.S. 1977:

> "Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States."

Section 1-12-303, W.S. 1977:

> "The court may inform itself of foreign laws in such manner as it deems proper, and the court may call upon counsel to aid it in obtaining such information."

Counsel for defendant informed the trial judge of his reliance on the statutes of limitation of other states. The statutes we set out are those applicable at the time of the occurrence herein and are found in the Wyoming State Law Library, Cheyenne.

The court in *Schwartz* strongly relied on *Schmidt* v. *Merchants Despatch Transportation Company*, supra, the court in the latter case stating at 200 N.E. 827:

> "That does not mean that the cause of action accrues only when the injured person knows or should know that the injury has occurred. The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. Except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury. Consequential damages may flow later from an injury too slight to be noticed at the time it is inflicted. No new cause of action accrues when such consequential damages arise. So far as such consequential damages may be reasonably anticipated, they may be included in a recovery for the original injury, though even at the time of the trial they may not yet exist. When substantial damage may result from any wrong affecting the person or property of another, a cause of action for such wrong immediately accrues." [Citation of cases omitted.]
>
> "We must apply that rule here. The injury to the plaintiff was complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust. For that injury, including all resulting damages, the defendant was then liable. The disease of the lungs was a consequence of that injury. Its result might be delayed, or, perhaps, even by good fortune averted; nevertheless, the disease resulted naturally, if not inevitably, from a condition created in the plaintiff's body through the defendant's alleged wrong. It cannot be doubted that the plaintiff might have begun an action against the defendant immediately after he inhaled the dust which caused the dis-

ease. No successful challenge could have been interposed on the ground that the action was prematurely brought because at the time it was commenced no serious damage to the plaintiff had yet developed. In that action the plaintiff could recover all damages which he could show had resulted or would result therefrom. In effect, the plaintiff is asking this court to hold that the statutory period of limitation begins only from the time that the plaintiff had reasonable assurance that serious damage had resulted or would result from past injury. The statute provides in unambiguous language that the period of limitation begins to run at the moment when right to begin an action accrues. The same test must be applied to a challenge that the action is stale as to a challenge that the action has been brought prematurely."

See also *Thornton* v. *Roosevelt Hospital*, 1977, 59 A.D.2d 680, 398 N.Y.S.2d 659, wherein a substance was injected into the plaintiff's decedent, allegedly resulting in the onset of cancer. The court held that "[t]he time of invasion of the decedent's body, and not any later time, began the period to be measured by the Statute of Limitation, and any such cause would also be time-barred." The court cited *Schwartz* and *Schmidt* as standing for that rule. Where more than the statutory period of limitations of three years from injury (onset of cancer) had lapsed, an action based on negligence as a cause was barred. *Karp* v. *Liggett & Myers Tobacco Company*, 1972, 40 A.D.2d 634, 336 N.Y.S.2d 101. New York jurisprudence has never retreated from that position in the oridinary negligently caused disease case.

The *Schmidt* doctrine as applied to this case means that a cause of action arose in New York when the defendant had sexual intercourse with the plaintiff at the Motel in the Mountains in Tuxedo, New York on the morning of April 8, 1970. At that time he introduced into the body of the plaintiff infectious pus producing bacteria known as

gonococci, which causes the disease of gonorrhea. There is no question but that under the law of New York the defendant was guilty of a tortious act of negligence and the plaintiff was injured by the placement in her body of deleterious matter. Then on the morning of April 21, 1970, the defendant once again at a hotel in New York City, New York repeated the tortious act and once again in the same fashion introduced into the body of plaintiff the bacteria of gonococci.

It must be realized that the entire affair between plaintiff and defendant embraced only a period of about two weeks so, with the period of limitations involved, it would not make much difference whether the rule of New York, the rule of the statute starting on the date of last exposure mentioned elsewhere in this opinion or the rule of discovery which we use in Wyoming,[8] were applied. It is not our choice; we must accept the law of the jurisdiction where the cause arose.[9] We must therefore conclude that since

[8] When a cause of action arises in the State of Wyoming, the period of limitations begins to run when the plaintiff knows or has reason to know the existence of a cause of action. *Banner* v. *Town of Dayton*, Wyo. 1970, 474 P.2d 300 (when the injury was discovered); *Town Council of Town of Hudson* v. *Ladd*, 1928, 37 Wyo. 419, 263 P. 703 (when the injury and cause became apparent).

[9] Generally, see Anno. entitled, "When limitation period begins to run against cause of action or claim for contracting of disease," 11 A.L.R.2d 277 and later case service.

The rule of last exposure in the case of continuing negligence in causing disease to another is commonly accepted to be that the injury occurs on the last day of exposure. After repeating the first principles that a cause of action does not arise unless there has been first a negligent act and second an actual injury, however slight proximately resulting therefrom, the court in *Biglioli* v. *Durotest Corporation*, 1957, 44 N.J. Super. 93, 129 A.2d 727, held that where a plaintiff is exposed over a period of time to beryllium there is but a single indivisible continuing wrong, with the statute running from the time of the last exposure to the dust, irrespective of when the disease of berylliosis is discovered

New York was the place of exposure, as was Schmidt's exposure to pneumoconiosis and the breathing of deleterious dust causing injury, a cause of action also arose in New York when defendant left gonococci in the plaintiff's body. It is a reasonable inference that since gonorrhea was found to exist in plaintiff the day after her final relations with the defendant, it existed likewise in New York. Having concluded a cause of action accrued in the State of New York, the "borrowing" statute of Wyoming controls the determination of whether or not plaintiff's action has been barred. Under New York law, an action to recover damages for personal injury, unless involving certain specific causes of action not relevant here, must be commenced within three years.[10]

Plaintiff's cause of action accrued in New York at the latest on April 21, 1970, the date of last sexual contact between the parties. Disregarding for the moment any other possibly applicable statute, plaintiff's action not having been filed until April 19, 1974, it appears to be barred, and defendant has so asserted. In response, plaintiff has urged that because of defendant's absence from New York

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or consequential damages result. The injury is present in the body.

The same rule was followed in *Wright* v. *Carter Products*, 2nd Cir., 244 F.2d 53, where the defendant negligently concocted the deodorant Arrid which plaintiff used daily over a period of time and developed dermatitis. The court held the statute commenced to run as of the last application.

[10] New York Civil Practice Law and Rules, § 214—Actions to be commenced within three years:

> "The following actions must be commenced within three years:
>
> * * * * * *
>
> "5. an action to recover damages for personal injury except as provided in § 215;"

following his tortious conduct, the applicable limitation period has by statute been tolled. N.Y. CPLR § 207.[11] We, as did the New York Supreme Court in a recent case, must disagree with the plaintiff. *Burwell* v. *Whitmoyer*, 1977, 56 A.D.2d 950, 392 N.Y.S.2d 512, 513:

> "We now pass to plaintiff's contention that the statute of limitations was tolled pursuant to CPLR 207. While that section does provide for the tolling of the statute where a defendant is out of the state for more than four months after the action has accrued, subdivision 3 provides for an exception where the jurisdiction over the person can be obtained without personal delivery of the summons to him within the state. Although defendant absented himself from the state * * * the statute of limitations, in our opinion, was

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[11] N.Y. CPLR § 207:

"If, when a cause of action accrues against a person, he is without the state, the time within which the action must be commenced shall be computed from the time he comes into or returns to the state. If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for four months or more, or he resides within the state under a false name which is unknown to the person entitled to commence the action, the time of his absence or residence within the state under such a false name is not a part of the time within which the action must be commenced. This section does not apply:

"1. while there is in force a designation, voluntary or involuntary, made pursuant to law, of a person to whom a summons may be delivered within the state with the same effect as if served personally within the state; or

"2. while a foreign corporation has one or more officers or other persons in the state on whom a summons against such corporation may be served; or

"3. while jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state."

not tolled by CPLR 207 (citation omitted). Plaintiff at all times during the statutory period could have obtained jurisdiction over defendant (CPLR 313; 308, subd. [5]; 302, subd. [a], par. 2)."

See as well, *Yarusso* v. *Arbotowicz*, 1977, 41 N.Y.2d 516, 393 N.Y.S.2d 968, 362 N.E.2d 600; *Goodemote* v. *McClain*, 1972, 40 A.D.2d 22, 337 N.Y.S.2d 79; *Dobkin* v. *Chapman*, 1968, 21 N.Y.2d 490, 289 N.Y.S.2d 161, 236 N.E.2d 451; *Fishman* v. *Sanders*, *1965, 15 N.Y.2d 298, 258 N.Y.S.2d 380, 206 N.E.2d 326; Massik* v. *Zimmerman*, 1966, 26 A.D.2d 901, 275 N.Y.S.2d 373. Under the provisions of N.Y. CPLR § 302, the defendant, although a non-domiciliary of the state of New York, was still subject to the personal jurisdiction of the courts of that state based upon his commission of a tortious act within the confines of the state itself. N.Y. CPLR § 302.[12]

Once found subject to the court's jurisdiction, service of process could have been made upon defendant notwithstanding his absence from the state. N.Y. CPLR § 308.[13]

"* * * Because the alleged negligence of defendant * * * was a tortious act committed within the State,

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[12] N.Y. CPLR § 302(a)(2)

"§ 302. Personal jurisdiction by acts of nondomiciliaries

"(a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

* * * * * * *

"2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or * *."

[13] N.Y. CPLR § 308(5):

"§ 308. "Personal service upon a natural person shall be made by any of the following methods:

personal jurisdiction could have been acquired under CPLR 313 and 302 by service in Florida, after defendant had transferred his residence there, in any manner in which service can be made in this State." *Yarusso* v. *Arbotowicz*, supra, 393 N.Y.S.2d at 970, 362 N.E.2d at 602.

It would thus seem clear that had plaintiff brought this action against defendant in New York, the situs of its accrual, by the statutes and authorities of that state, her cause of action would be barred. The limitational period having run in New York, it has run in this, the forum state, as well. § 1-3-117, W.S.1977, supra.

We observe in passing that while there is no ruling of the trial judge here which specifically applies by reference any foreign statute of limitations, the distinct impression appears, particularly from the court's order, footnote 4, that the statute of New York was applied to keep the case alive as to the adhesions appearing first in 1973 and their

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"5 in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section."

N.Y. CPLR § 313:

"§ 313. Service without the state giving personal jurisdiction

"A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction."

consequences. The statute of limitations goes to the cause of action not the various elements of damages which arise as a result of the injury. Damages excluded by the trial judge were within the Wyoming four year limitation urged by plaintiff as applicable.

In other jurisdictions in which defendant committed his acts of negligence, the cause of action is likewise either barred by a statute of limitations or no cause of action there arose. The defendant's first installment of negligence, April 4-5, 1970, was in the State of Virginia. Arguably, under the law of the state, the cause of action could have arisen there; if indeed it did, it is likewise barred by that state's limitations. In Virginia, the appropriate limitational period for personal injuries of the kind sustained herein is two years,[14] and even though the defendant did not then and does not now reside in Virginia, he was still subject to the personal jurisdiction of its courts through its long arm statutes because of his allegedly tortious conduct within the state.[15]

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[14] Code of Virginia § 8.01-243 in pertinent part:

> "A. Unless otherwise provided by statute, every action for personal injuries, whatever the theory of recovery, except as provided in B hereof, shall be brought within two years next after the cause of action shall have accrued.
>
> * * *"

[15] Code of Virginia § 8.01-328.1 in pertinent part:

> "A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's
>
> * * * * * *
>
> "3. Causing tortious injury by an act or omission in this State;
>
> * * *"

The legislature of Virginia has removed some of the complexities of determining when the statutes of limitation of that state start to run by enactment of the Code of Virginia, § 8.01-230:

> "In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person, when the breach of contract or duty occurs in the case of damage to property and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsec-

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Code of Virginia § 8.01-329:

> "Service of process or notice.—A. When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made in the same manner as is provided for in chapter 8 (§ 8.01-285 et seq.) of this title in any other case in which personal jurisdiction is exercised over such a nonresident party, or process or notice may be served on any agent of such person in the county or city in this State in which he resides or on the Secretary of the Commonwealth of Virginia, thereinafter referred to in this section as the 'Secretary,' who, for this purpose, shall be deemed to be the statutory agent of such person.
>
> "B. Service of such process or notice on the Secretary shall be made by leaving a copy of the process or notice, together with the fee prescribed in § 14.1-103 in the hands of the Secretary or in his office in the city of Richmond, Virginia, and such service shall be sufficient upon the nonresident, provided that notice of such service and a copy of the process or notice are forthwith sent by registered or certified mail, with delivery receipt requested, by the Secretary to the defendant or defendants at such defendant's or defendants' last known post-office address, and an affidavit of compliance herewith by the Secretary or someone designated by him for that purpose and having knowledge of such compliance, shall be forthwith field with the papers in the action."

tion C of §§ 8.01-245, 8.01-249, 8.01-250 or other statute." (Other sections referred to have no application.)

That provision appears to codify the traditional rule of Virginia case law. *Hawks* v. *DeHart*, 1966, 206 Va. 810, 146 S.E.2d 187. In *Hawks* The court made it clear that:

> "We are committed in Virginia to the rule that in personal injury actions the limitation on the right to sue begins to run when the wrong is done and not when the plaintiff discovers that he has been damaged."

The court then went on to cite *Street* v. *Consumers Mining Corp.*, supra, footnote 6, a disease case bearing some resemblance to the case before us now. The plaintiff there breathed silica dust and contracted the disease of silicosis. His last exposure to the dust was 1936. It was there held that the statute began to run upon the date of his last exposure.

There is no testimony or evidence in this case as to exact time the plaintiff was infected by exposure to defendant's disease. We shall assume for the moment that she was infected instantly upon the sexual intercourse taking place in the Virginia parking lot. If that was the case, a strict reading of the Virginia statute, § 8.01-230, supra, indicates that the cause of action arose in Virginia on April 4-5, 1970. On the other hand, if we follow the holding of the Virginia court's *Street* case, supra, that the statute begins to run upon the date of last exposure, then the cause of action arose in New York City, New York, on April 22, 1970 where the last act of sexual intercourse took place. In the first instance, the plaintiff is barred in Virginia by its two year statute of limitations. In the other no cause of action arose in Virginia.

Virginia has a tolling statute, Code of Virginia, § 8.01-229, in pertinent part:

> "D. When an action has been commenced and service of process upon a defendant shall be prevented by such defendant
>
> 1. Departing from the Commonwealth; or
>
> 2. Absconding or concealing himself; or
>
> 3. Filing a petition in bankruptcy or filing a petition for an extension or arrangement under the United States Bankruptcy Act; or
>
> 4. Using any other direct or indirect means to obstruct the prosecution of such cause of action;
>
> then the time that such prevention may have continued shall not be counted as any part of the period within which the action must be brought."

The Supreme Court of Virginia has held that the limitation period is not tolled if process can be served despite the defendant's absence as by service of process under Virginia's "long arm" statute, footnote 15, because absence from the state does not obstruct the prosecution of a plaintiff's claim. *Bergman* v. *Turpin*, 1965, 206 Va. 539, 145 S.E.2d 135. This court has heretofore cited this case, we also holding that the tolling statute is not applicable where there is another method of service available to the plaintiff. *Tarter* v. *Insco*, Wyo.1976, 550 P.2d 905.

[18-22] Even if it could be considered that a cause of action arose in Pennsylvania,[16] its statute of limitations

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[16] In Pennsylvania a right of action accrues only when injury, as defined by the courts of that state, is sustained by the plaintiff, not when the causes are set in motion which ultimately produce injury as a consequence. *Ayers* v. *Morgan*, 1959, 397 Pa. 282, 154 A.2d 788; *Foley* v. *Pittsburg-Des Moines Co.*, 1949, 363 Pa. 1, 68 A.2d 517, supra. Its two year period begins to run when the injury is done; an injury is considered done "when the

bars any action there. The Pennsylvania statute of limitations, 12 P.S. § 34,[17] provides that a personal injury action "must be brought within two years from the time when the injury was done and not afterwards." The tolling statute of Pennsylvania, 12 P.S. § 40, applies only to residents:

> "In all civil suits and actions in which the cause of action shall have arisen within this state the defendant or defendants in such suit or action, who shall have become non-resident of the state after said cause of action shall have arisen, shall not have the benefit of any statute of this state for the limitations of actions during the period of such residence without the state."

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act heralding a possible tort inflicts a damage which is physically objective and ascertainable." *Ayers* v. *Morgan*, supra. A reading of the cited authorities discloses the rule to be tantamount to the rule of discovery, i.e., a cause of action arises upon discovery of the injury (physically objective and ascertainable). The final significant event then was discovery of the injury—presence of the disease, gonorrhea-in Washington, D.C. after examination and testing April 22, 1970. No cause arose in Pennsylvania because no injury, as defined by the Pennsylvania court, occurred nor was discovered in that state, though the cause thereof—defendant's implanting of gonococci—took place in Pennsylvania. The question of of conflicts was decided in *Mack Trucks, Inc.* v. *Bendix-Westinghouse Automotive Air Brake Company*, 3rd Cir. 1966, 372 F.2d 18, where it was held that the Pennsylvania "borrowing" statute, 12 P.S., § 40, must be applied because the injury occurred in Florida arising out of a cause generated in Pennsylvania; so, therefore, Florida was where the action arose and the latter state's limitation statutes barred the action.

[17] 12 P.S. § 34:

> "Every suit hereafter brought to recovery damages for injury wrongfully done to the person, in case where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death the limitation of action shall remain as now established by law."

It affects all defendants who become nonresidents after the cause shall have arisen—" 'meaning, necessarily, defendants who had a residence at the time the cause of action arose, else they could not "become" nonresidents.' " *Hunter* v. *Bremer*, 1917, 256 Pa. 257, 100 A. 809, quoting from *Bates* v. *Cullum*, 1896, 177 Pa. 633, 637, 35 A. 861, 862, 34 L.R.A. 440, 55 St.Rep. 753. Since defendant was a resident of the State of Wyoming at the time of all the occurrences herein, the Pennsylvania statute has run. The presence of plaintiff and defendant in Pennsylvania was only transient.

[23-26] We must also conclude that no cause of action arose in Iowa. Iowa follows the Restatement, Conflict of Laws, § 377 rule that: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." *Andersen* v. *National Presto Industries, Inc.*, 1965, 257 Iowa 911, 135 N.W.2d 639. It is interesting to note that in *Andersen*, to support its position that parts of a tort may arise in different places, it cites *Price* v. *State Highway Commission*, 1946, 62 Wyo. 385, 167 P.2d 309, 312, where it is said:

> "* * * Generally speaking and without undertaking in the least an all inclusive definition, a tort has a meaning somewhat similar to wrong and is an unlawful act injurious to another independent of contract."

Of course, reference is made to the fact that a tort is in at least two parts: (1) an act committed resulting in (2) damage. Iowa further follows the general rule that a cause of action accrues when the injured party has a right to institute and maintain a suit; a cause of action based on negligence does not accrue until the plaintiff has in fact discovered that he has suffered injury. *Chrischilles* v. *Griswold*, 1967, 260 Iowa 453, 150 N.W.2d 94. Since Iowa follows the discovery rule, as noted, it would appear that it was in Washington, D.C. that the cause of action accrued as far as that state is concerned because it was in the

District of Columbia that plaintiff discovered that she had in fact suffered injury by virtue of the negligent conduct of the defendant.

[27-29] Nebraska also follows the majority rule that a cause of action accrues when injury actually occurs and there is a basis for a cause of action. *Omaha Paper Stock Company, Inc.* v. *Martin K. Eby Construction Company, Inc.*, 1975, 193 Neb. 848, 230 N.W.2d 87. A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. *Weiss* v. *Weiss*, 1966, 179 Neb. 714, 140 N.W.2d 15. That rule is more fully said in *Bend* v. *Marsh*, 1945, 145 Neb. 780, 18 N.W.2d 106, 110:

> "The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief."

Under the law of Nebraska, no action arose there.

There are only three rules that can be applied as to when a cause of action accrues in the case of continuing negligence. Applying those rules to Nebraska, in this case there is no proof as to just when plaintiff was actually infected—the only medically certain inference is that she had gonorrhea in New York, on April 21, 1970. The gonococci may have taken hold at once following the first exposure or the results delayed until some later time. We cannot guess and will not try to. Rules for such situations have been devised and we have mentioned or discussed them all. Applying any one precludes the plaintiff one way or another.

[30] If we follow the New York rule, of injury being concurrent with the tortious act of invading the plaintiff's body with a dangerous substance, the Nebraska statute of

limitations bars plaintiff. The exposure in Nebraska took place during the night of April 10-11, 1970. Nebraska has a four year statute of limitations for personal injury actions, § 25-207, Revised Statutes of Nebraska, 1943, Reissue of 1975, supplementing § 25-201.[18] It likewise has a tolling statute, § 25-214, Revised Statutes of Nebraska 1943, Reissue of 1975, covering absent persons.[19] Nebraska has a long arm statute, § 25-536, Revised Statutes of Nebraska, 1943, Reissue of 1975, enacted in 1967, in pertinent part:

> "(1) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:
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> * * * * * *

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[18] Section 25-207, R.R.S. 1943, 1975:

> "The following actions can only be brought within four years: (1) An action for trespass upon real property; (2) an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; (3) an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; and (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, except as provided in sections 30-2206 and 76-288 to 76-298."

Section 25-201, R.R.S.1943, 1975: "Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued."

[19] Section 25-214, R.R.S.1943, 1975:

> "If, when a cause of action accrues against a person, he is out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

"(c) Causing tortious injury by an act or omission in this state;

* * *"

While we have been unable to find a Nebraska case on the subject, we would expect it to follow the general rule that the tolling statute is not applicable where a long arm statute makes a substituted method of personal service available to the plaintiff. *Tarter* v. *Insco,* supra, 550 P.2d 905, at footnote 5 of that case. Plaintiff's action was therefore barred in Nebraska under the New York rule, on April 12, 1970, over four years prior to filing the instant action.

If the Wyoming discovery rule, footnote 8, is followed, then the cause of action as to Nebraska arose in Washington, D.C. where the presence of gonorrhea in plaintiff was confirmed. A federal court in a diversity action believes that Nebraska would follow the discovery rule in a beryllium case where plaintiff was exposed over a long period, when the negligence arose in Massachusetts and the injury occurred in Nebraska. *Sylvania Electric Products* v. *Barker,* 1st Cir. 1955, 228 F.2d 842, cert, den. 350 U.S. 988, 76 S.Ct. 475, 100 L.Ed. 854. If we follow the last exposure rule which we have discussed, then the cause of action, as far as Nebraska is concerned, arose in New York where the last act of sexual intercourse took place.

We foreclose Washington, D.C. as the place where a cause of action arose because no tortious act was committed there, nor was that a place where the plaintiff was injured by the implanting of infection by the defendant. It is true that Washington, D.C. was the place where plaintiff incurred medical expense for diagnosis and treatment of the injury inflicted upon her but has no controlling force as to where the cause arose. While she had money damages in the District of Columbia, her physical injury of contracting gonorrhea took place elsewhere. The law of the District in that regard is expressed by its courts in an analogous way where it has dealthwith its long arm statute. A good

example is *Leaks* v. *Ex-Lax, Inc.,* USDC DC 1976, 424 F.Supp. 413. The District's long arm statute[20] provides that a court of the District may exercise personal jurisdiction in some cases on a claim of relief for causing tortious injury in the District by an act or omission outside the jurisdiction. The plaintiff was in Phoenix, Arizona where she purchased a box of Ex-Lax pills and took two. She shortly suffered a severe reaction and went to a Phoenix hospital for treatment and also saw a physician who prescribed treatment. A month later she returned to the District where she claimed she continued to suffer on a continuing basis and, because of incapacity, lost income. The court held that Arizona being the place when the injury arose, any damage incurred in the District thereafter was only one measure of her total damages. We thus see the district court of the District of Columbia refusing to take jurisdiction in an action where the injuries arose elsewhere and in refusing to divide damages to acquire jurisdiiction. The principles apply comparably to the situation before us. See also *Aiken* v. *Lustine Chevrolet, Inc.,* USDC DC 1975, 392 F.Supp. 883, where the tort was committed in Maryland but the damage arose in the District.

We therefore must conclude after extensive research that by virtue of Wyoming's borrowing statute, the filing of plaintiff's complaint on April 19, 1974 was untimely.

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[20] Section 13-423, D.C.Code 1973 in pertinent part:

"(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—

* * * * * * *

"(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;

* * *"

Reversed with directions to vacate the judgment for plaintiff and enter judgment for the defendant.

THOMAS, Justice, concurring.

I concur in the result in this case that was reached by the majority of the Court. I would, however, reach that result in a different manner. In my view this action was barred by the three-year statute of limitations of the District of Columbia (§ 12-301, D.C.Code Ann. (1973)), which is the place where the cause of action arose and to which we are directed by § 1-3-117, W.S.1977. The District of Columbia, like our state, follows a discovery rule with respect to the accrual of an action in tort. *Grigsby* v. *Sterling Drug, Inc.*, 428 F.Supp. 242 (1975); affirmed, 177 U.S.App.D.C. 270, 543 F.2d 417 (1976). In the *Grigsby* case the court concluded that the statute of limitations began to run when the plaintiff knew, or through the exercise of due diligence could have known, that she had a claim that her injuries were caused by a defect in the defendant's product. That knowledge was acquired upon her examination by a physician in October even though in *Grigsby's* instance she had symptoms manifesting injury in August. It was not until the examination by her physician in Washington, D.C., that Margaret Housen knew of her injury, and prior to that time all of the elements of the cause of action in tort were not present. No injury to the plaintiff could be demonstrated prior to that examination, and in any other jurisdiction we must speculate as to the occurrence of an injury.

I am impressed with the reference in the majority opinion and the dissenting opinion to A.L.I. Restatement, Conflict of Laws, § 377 (1934), which sets forth the rule as follows:

> "§ 377. The Place of Wrong.
>
> "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

As I understand the thrust of the majority opinion that place is determined to be the state of New York. Included within § 377 is a section entitled "Summary of Rules in Important Situations Determining Where a Tort is Committed.", and included within that section is a rule set forth as follows:

> "2. When a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered.
>
> "Illustration:
>
> > "2. A, in state X, mails to B in state Y a package containing poisoned candy. B eats the candy in state Y and gets on a train to go to state W. After the train has passed into state Z, he becomes ill as a result of the poison and eventually dies from the poison in state W. The place of wrong is state Z."

This illustration seems peculiarly applicable to the factual situation herein in which the infection could have been transmitted in any one of a number of states. The plaintiff did not manifest any symptoms of the disease, and the illness was identified in Washington, D.C., upon physical examination. I have no quarrel with the general discussion of the law relative to statutes of limitations set forth in the majority opinion, but those concepts are designed to reach a degree of certainty in the law, albeit arbitrarily. Their application in this instance identifies the District of Columbia as the place of the wrong.

The application of the District of Columbia statute is consistent with views this Court previously has expressed in *Ball* v. *Ball*, 73 Wyo. 29, 269 P.2d 302 (1954); *Brown* v. *Riner*, Wyo., 500 P.2d 524 (1972); and *Cantonwine* v. *Fehling*, Wyo., 582 P.2d 592. Even if one should turn to the more modern "substantial relationships" test set forth in

A.L.I. Restatement (Second), Conflict of Laws, §§ 145, 146 (1971), the result would be the same. According to § 146 of that work the law of "* * * the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties * * *" Section 145 lists the contacts to be taken into account in applying the principles of § 6 to a tort situation, and none of them result in any other state having a more significant relationship to the occurrence and these parties than the District of Columbia. Some of these factors have no application at all under this set of circumstances.

In this particular instance since the selection of the District of Columbia avoids any speculation with respect to the facts, and because of the suggestions in the several treatises, including those cited and discussed in the majority and dissenting opinions, I would select as the place of injury the District of Columbia. Applying its statute of limitations which begins to run upon discovery of the illness, I would hold that the action was barred by the applicable statute of limitations.

McCLINTOCK, *Justice, dissenting.*

In brief outline of the basis of my dissent, I agree with the majority that under the common law, limitations of actions are governed by the law of the forum. Section 1-3-117, W.S.1977, the so-called borrowing statute, changes that rule only to the extent that we are required to apply the limitation of another state if it is determined that the "cause of action arose" in that other state. The majority recognize that both a wrongful act and a resulting injury are necessary to effect an actionable tort, and that the "law of the place where the plaintiff sustains injury to her person controls." 589 P.2d at p. 341. The record does not disclose and neither the jury nor this court could find the specific state where either the wrongful act took place or

the plaintiff sustained injury to her person. An essential prerequisite to application of our borrowing statute, namely, that there be a state from which to borrow, is then lacking. However, it might be logically consistent with § 1-3-117 to hold the action barred if, by the law of *all* the states where the action might possibly have arisen, the action is barred. That is not the situation here, since Nebraska and Wyoming, both of which are states where the injury could have taken place, have four-year statutes and both are discovery states. My essential disagreement with both the majority and concurring opinions is with their concept that discovery of the wrongful act and resulting injury is an essential condition to the existence of an actionable tort. I would hold that discovery is of importance only in determining when a statute of limitations begins to run. I would then hold that defendant, who bears the burden of proving facts bringing the case within an applicable statute of limitations, has failed in that burden. I would therefore not dismiss the action.

The jury has specially found that defendant was infected with gonorrhea during the period April 4 to 21, 1970, which was the period during which the parties had continuing sexual relations. The first element of an actionable tort then occurred when this infected person, knowingly or with careless disregard as to his condition, had sexual relations with plaintiff without taking possible and proper precautions to prevent transmission of the disease. But only if this act resulted in communication of the disease to his partner would there be an actionable wrong. Consistently with the testimony of Dr. Beletti that "one may have the disease and not necessarily transmit it to another,"[1] nei-

[1] It is said in the VD Book by Chiappa and Forish, in question and answer form, that "a man's chances of catching gonorrhea, when exposed to someone who has it are from one in five to one in twenty for each exposure. A woman's chances probably are closer to one in two." I do not fnd in the record anything concerning sanitary precautions that might have been taken by either of the parties.

ther the jury nor this court could or can properly find that on a specific date and at a specific place within a period of 18 days and an area of five states,[2] the infection was transmitted to plaintiff. Nor could the jury or this court, consistently with any evidence in the cause, find that on a specific date within that 18-day period and at a specific place within an area of 11 states[3] the disease incubated and developed to a point of injury to plaintiff.

On the basis that chances of infection are not 100% and that the incubation period for the disease is variable,[4] it is possible but not very probable that transmission, incubation and injury occurred in any one of the five contact states; it is similarly possible and perhaps more probable that transmission occurred in one state and this took effect, that is, injury occurred, in another. Consistently with the proper holding of the majority that it is the law of the state of injury[5] and not of the wrongful act that determines

[2] Sexual acts occurred in Virginia, New York, Pennsylvania, Iowa, Nebraska, and again in New York.

[3] The parties first had sexual contact in Virginia on the night of April 4–5, and had their last contact in New York on the night of April 21–22. That is the 18-day period to which I refer.

[4] In the book, Venereal Disease, 3d Ed., by King and Nicol, it is said that the incubation period may vary from two to ten days, but that in most cases it is five days or less. Control of Communicable Diseases in Men, 11th Ed., gives the incubation period as "3 to 4 days, sometimes 9 days or longer." In Ch. 19, Practice of Medicine, Vol. III, it is said that "the incubation period may be prolonged, but approximately 95% of patients will develop symptoms within 2 weeks."

[5] I would consider the case at bar a perfect example of the principle set forth in § 377, Restatement of Conflict of Laws, mentioned in Justice Thomas's concurring opinion that when a person causes another " 'to take a deleteriouss substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered.' " The illustration of a person sending poison to another person in another state, who there takes it, then in the course of a trip becomes ill in a second state and dies in a third, is quite

whether a tort has been committed, it is possible that the tort could have become complete in any one of 11 states in which the plaintiff, in the company of the defendant, or separately, found herself during the 18-day sojourn between the first contact and confirmation of the existence of the disease in plaintiff in Washington on April 22.

I think it fairly obvious that our § 1-3-117 was not adopted with this type of tort in mind and it is true that in most cases the state where the action arose is not too difficult to determine. In products liability cases, for example, where the negligence occurs in one state and the product is purchased and used in another state, with injury to the user, there is a clear demarcation. But in this case, which I think we all agree is one of first impression in its interstate nature, the place of injury is obscure and all we know is that at some time and place the plaintiff was injured through negligent act of the defendant. This has been found by the jury. I do not think that we can properly conclude that our legislature has said that if the action would be barred in *one* of a number of *possible* states, it is likewise barred in this state. The statute of no one state may be adopted unless it is clearly established that it was the place of injury.

Although it is the law of the place of injury that governs, the majority briefly and I think arbitrarily dismiss Wyoming as a possible place of wrong because no sexual act took place therein. If transmission of the disease through sexual intercourse is not certain and if there is an incubation period, then it is possible that transmission and planting of the infection occurred in one state and took effect in

pertinent to our problem. Here the poison is administered in some state that we do not know, and takes effect in either that state or another that we do not know. Nevertheless, the place of wrong is where the poison takes effect within the body. In our case, the poison could have been administered in Nebraska and taken effect in Wyoming.

another. For example, it is entirely possible that this transmission occurred in Nebraska and took effect in Wyoming so that our state is not only the forum state of the action but is also the place of wrong. Although sexual contact occurred in Nebraska, the disease may have been transmitted through a previous contact, taking effect in Nebraska, so that was the state of injury. If the actionable tort was committed in Nebraska, conceded by the majority to be a discovery state, the statute would not start to run until the wrong was discovered. But that state is excluded by the majority only on the basis that discovery was made in either New York City or Washington, D. C., and discovery is said to be an essential element to the cause of action.

I would submit that the fact of discovery is not an essential ingredient to the existence of an actionable wrong and that the position of the majority (more clearly enunciated by Justice Thomas in his concurring opinion) is sustained neither by authority nor reason. Obviously no suit can be brought without knowledge of facts which constitute the basis of the claim, but as said in 1 Cooley on Torts, 4th Ed., § 46, p. 87, "it is the conjunction of damage and wrong that creates a tort." As said by the Supreme Court of Washington in *Highline School District No. 401, King County* v. *Port of Seattle,* 87 Wash.2d 6, 548 P.2d 1085, 1090 (1976), "[a]cause of action accrues on the occurrence of the last element essential to the action." In the same vein is *Boulder City* v. *Miles,* 85 Nev. 46, 449 P.2d 1003, 1005 (1969): "A cause of action accrues only when the forces wrongfully put in motion produce an injury." Nowhere in these authorities or any that I have been able to find is it said that knowledge or discovery is an essential element of the actionable tort. The majority therefore assume a rule that has no judicial backing. While I cannot cite direct authority for my position, I believe it is consistent with principles set forth in the following citations.

In *Cantonwine* v. *Fehling,* Wyo., 582 P.2d 592, 596 (1978), we quoted with apparent approval this statement from the early case of *Biller* v. *Boswell,* 9 Wyo. 57, 72, 59 P. 798, 803 (1899), reh. denied 9 Wyo. 57, 80, 61 P. 867:

> " '. . . A "cause of action" is defined as matter for which an action may be brought. It is said to accrue to any person when that person first comes to a right to bring an action. * * * Again, when a wrong has been committed, or a breach of duty has occurred, the cause of action has accrued, *although the claimant may be ignorant of it.* * * *' " (Emphasis added)

I therefore conclude that it is only in the application of the statute of limitations to the remedy to be sought for an accrued cause of action that the question of discovery becomes of importance. It is only in connection with the question of limitations that we find judicial statements that the action has accrued upon "discovery" of the wrong or injury. It appears that this is a developing concept. In 2 Wood on Limitations, 4th Ed. 1916, § 276c(1), pp. 1408–1410, we find this broad statement:

> "Mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations unless there has been fraudulent concealment on the part of those invoking the benefit of the statute."

Examination of the whole section discloses no application of the discovery principle except in fraud cases. But this old rule has been changed in many states, including Wyoming, which as conceded by the majority has turned to the discovery rule. But this rule is of significance only when considering the question of when the statute of limitations begins to run. This quotation from *Gazija* v. *Nicholas Jerns Company,* 86 Wash.2d 215, 543 P.2d 338, 341 (1975) is particularly pertinent:

> "While in many instances damage occurs and the action accrues immediately upon the occurrence of the

wrongful act, this is not always true. In circumstances where some harm is sustained, but the plaintiff is unaware of it, a literal application of the statute of limitations may result in grave injustice. Courts have avoided this consequence of older cases like *Shaw*[*] by adopting the fictions of continuing negligence, fraudulent concealment or constructive fraud. There is now a wave of modern decisions which abandon these fictions and these simply hold that the statute will no longer be construed as intended to run until the plaintiff has in fact discovered that he has suffered injury or by the exercise of reasonable diligence should have discovered it. [Citations omitted]

"*Bearing in mind that we are construing a limitations statute and not just a definition of a cause of action,* the word 'accrued' should be construed in a manner consistent with a prima facie purpose to compel the exercise of a right within a reasonable time without doing an unavoidable injustice." (Emphasis added)

When the majority include discovery as an element in the accrual, that is the commission, of a completed tort, they ignore the whole manner in which the concept of discovery has developed. *Schwartz* v. *Heyden Newport Chemical Corporation,* 12 N.Y.2d 212, 237 N.Y.S.2d 714, 188 N.E.2d 142, 4 A.L.R.3d 814 (1963), cited by the majority, as well as the earlier case of *Schmidt* v. *Merchants Desp. Transp. Co.,* 270 N.Y. 287, 200 N.E. 824, 104 A.L.R. 450 (1936) are based on the proposition that "[t]he wrong is done, the right violated, and the cause of action complete when the invasion takes place," 237 N.Y.S.2d at 717, 188 N.E.2d at 144. This being the case, the statute of limitations was read literally and it was said to begin to run from the time that the injury occurred, whether known or not. This was the established rule at the time Wood wrote

[*] *Shaw* v. *Rogers and Rogers,* 117 Wash. 161, 200 P. 1090 (1921).

his treatise in 1916. The development of the discovery rule was designed to get away from this harsh result and represented a different approach, as I have quoted from *Gazija,* supra, from the resort of some courts to such fictions as continuing negligence, fraudulent concealment or constructive fraud. As the whole matter is summed up in Prosser on Torts, 4th Ed., § 30, p. 144:

"* * * Quite recently there have been a wave of decisions meeting the issue head-on, and holding that the statute will no longer be construed as intended to run until the plaintiff has in fact discovered that he has suffered injury, or by the exercise of reasonable diligence should have discovered it."

Prosser does not say and the cases applying the discovery rule do not say that previous rules of tort law are amended to include discovery as an element of the tort. The decisions are strictly confined to a construction and application of the limitations statute.

I concede that I have referred to possibilities. If those possibilities. If those possibilities concerned whether defendant had committed an actionable tort against plaintiff, it might well be said that plaintiff did not sustain the burden of proof resting upon her. However, defendant has not contended in his brief or upon oral argument that the evidence was insufficient to support the verdict of negligence rendered by the jury. The bar of the statute of limitations is one sought to be raised by the defendant in avoidance of established liability. In such case, "[t]he party pleading the statute of limitations has the burden of proving that the action is barred." *Garland* v. *True Temper Corporation,* 354 F.Supp. 328, 330 (D.C.W.Va.1973). See also, *Ray* v. *Oklahoma Furniture Mfg. Co.,* 170 Okl. 414, 40 P.2d 663 (1935); *Savannah Bank & Trust Co.* v. *Meldrim,* 195 Ga. 765, 25 S.E.2d 567 (1943); *Wahl* v. *Cunningham,* 320 Mo. 57, 6 S.W.2d 576 (1928). While indicating

that the authorities are not in complete agreement, it is said in 54 C.J.S. Limitations of Actions § 386, p. 523 that

> "* * * in a majority of jurisdictions it is a rule that the party pleading the statute has the burden of proof, that is, the burden of proving that the cause of action accrued more than the statutory time before the commencement of the action."

This court does not seem to have passed specifically on where the burden of proof lies in such cases, but a good many years ago it said that the defense of limitations "Becomes available on demurrer only when the petition shows affirmatively that the statutory period has elapsed before the action was commenced." *Marks* v. *Board of Com'rs of Uinta County*, 11 Wyo. 488, 493, 72 P. 894 (1903). Rule 8(c), W.R.C.P. treats the statute as an affirmative defense. In *First Nat. Bank of Morrill* v. *Ford*, 30 Wyo. 110, 121, 216 P. 691, 31 A.L.R. 1441 (1923), it is said that the burden of proof is on the defendant "as to all affirmative defenses, whether they relate to the whole case or only to certain issues in the case."

Defendant does not plead the statute of limitations of any particular state, and claims only that the action is barred by the provisions of our borrowing satute, § 1-3-117, W.S.1977. In this court he relies on the District of Columbia three-year statute. I would hold that statute inapplicable on the basis already discussed, and since he has shown no other statute which governs and has not shown that the statutes of all possible places of wrong have run, he has failed in his burden. From this, it follows that the action should not be dismissed.

While other errors have been assigned by defendant, they have not been discussed by the majority and there is no point in my considering them. However, in order to indicate that this dissent has not been just an idle joust with the statute of limitations issue, I would add that while I find some merit in some of the propositions advanced for reversal, I find nothing which would result in direction of the entry of judgment for the defendant.

APPENDIX B

SUPREME COURT OF WYOMING.

No. 4811

"PONY" DUKE,
Appellant (Defendant below),
v.
MARGARET HOUSEN,
Appellee (Plaintiff below).

March 2, 1979.

Order Denying Rehearing

Before RAPER, C. J. McCLINTOCK and THOMAS, JJ., GUTHRIE, J., Retired and ARMSTRONG, D. J., Retired. ROONEY, J., did not participate.

RAPER, Chief Justice.

After full consideration, it is, by a majority of the Court so deciding,

ORDERED that the plaintiff-appellee's Petition for Rehearing be and is denied. McCLINTOCK, Justice, dissenting.

The majority opinion has been a confusing and difficult one for me to read because of contradictory statements,[1]

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[1] To me, a glaring instance of contradiction is found by comparison of the satements at pages 349 and 351 of the Reporter (589 P.2d) with the finding and holding at page 345. The first statements mentioned are both to the effect that there is no testimony or proof as to just when the plaintiff was infected, with the further remark in the latter that the gonococci "may have taken hold at once following the first exposure or the results delayed until some later time. We cannot guess and will not try to." At page 345 the majority say: "We find and hold that a cause of action arose in the state of New York on April 8, 1970 and April 21, 1970." These are dates on which the parties had sexual relations in that state. The significance of these contra-

leaving me without a clear understanding as to just what is the holding of the court. I share the concern expressed in the petition for rehearing that the majority ignore two well-established rules of this court: that it will grant all favorable inferences to the appellee,[2] and that it is not the trier of the facts.[3] I agree with counsel that not only has the majority made such findings but that they are not supported by and in some cases in conflict with the uncontradicted evidence.[4] These, to me, are sufficient reasons for granting a rehearing but my chief concern and principal reason for dissenting from the denial of rehearing is my belief that the principal and concurring opinion both inject a new and improper element into the creation of an actionable tort. That new element is discovery of the damage resulting from the wrongful act.

Justice Thomas clearly and unequivocally states that discovery is such a necessary element. The principal opinion first states that the elements of a tort are a wrongful act plus injury, but the states of Pennsylvania, Iowa and Nebraska (all three being states where sexual acts took place and the disease could have been implanted and develop to the point of injury) are excluded on the basis that in those states discovery is necessary before any cause of

dictions is emphasized by the earlier statement in the opinion at page 344 where after discussing the applicability of a foreign statute of limitations, it is said, "It thus becomes of acute importance in the situation at bar to specifically determine for limitation of action purposes, where and when plaintiff's cause of action arose." In my opinion the majority never succeed in this endeavor.

[2] *Zitterkopf* v. *Roussalis*, 546 P.2d 436, 437 (Wyo.1976); *Jelly* v. *Dabney*, 581 P.2d 622 (Wyo.1978).

[3] *Neal* v. *Wailes*, 346 P.2d 132, 134 (Wyo.1959).

[4] I particularly have in mind the testimony of Dr. Belletti, mentioned in my dissent, that transmission of the disease does not necessarily result from intercourse. See also the notes regarding chances of infection and time of incubation of the disease.

action arises.[5] In my view, under the undenied facts of this case, it is impossible for this court to exclude from consideration the state of Nebraska and its applicable four-year statute of limitations, except on the basis that discovery is an essential element of the tort. There was no discovery in Nebraska; therefore no action arose in that state.

I shall not reiterate the argument advanced in my dissent, that discovery is not an element of the tort itself but, as counsel for plaintiff express it, "starts the clock but does not determine the state in which the clock starts ticking." I may be wrong in this view, but the principal opinion does not even discuss it. I think that the matter should be thoroughly discussed before we make discovery an element of the tort itself.

While I adhere to the principle in *Elmer* v. *State*, 466 P.2d 375, 376 (Wyo.1970) that rehearing will not be granted "unless there is a reasonable probability that the court may have arrived at an erroneous conclusion," I am of the opinion that the majority have done just that.[6] I would therefore grant a complete rehearing.

[5] As to Pennsylvania and Iowa, I concede my point is unimportant because, even treating the limitation as beginning to run upon discovery, the action would be barred by their shorter statutes. It is clear, however, that unless discovery is considered a necessary element of the tort so that no wrong was committed in Nebraska, the action was brought as to that state within its applicable statute.

[6] For a further discussion of my views concerning this rule see my dissent of rehearing in *Ash* v. *State*, 560 P.2d 369, 370 (Wyo. 1977).